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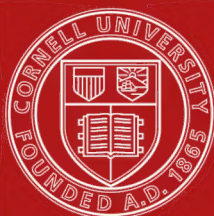
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# A TREATISE ON THE LAW OF EVIDENCE

BEING A CONSIDERATION OF THE  
NATURE AND GENERAL PRINCIPLES OF EVIDENCE, THE INSTRUMENTS OF EVIDENCE  
AND THE RULES GOVERNING THE PRODUCTION, DELIVERY AND USE OF EVIDENCE,  
TOGETHER WITH INCIDENTAL MATTERS OF PRACTICE, INCLUDING ALSO  
UNDER AN ALPHABETICAL ARRANGEMENT THE APPLICATION OF  
THE RULES AND PRINCIPLES OF EVIDENCE TO PARTICULAR  
ACTIONS, ISSUES AND PARTIES IN CIVIL, CRIMINAL,  
EQUITY AND ADMIRALTY CASES, TOGETHER  
WITH EVIDENCE IN COURTS MARTIAL

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AND

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and "APPELLATE PROCEDURE"

IN FOUR VOLUMES

VOLUME II  
INSTRUMENTS OF EVIDENCE

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# THE LAW OF EVIDENCE.

## CHAPTER XXX.

### INTRODUCTORY.

Sec.		Sec.	
687.	Instruments of evidence generally.	691.	Real evidence.
688.	Scope of volume.	692.	Documentary evidence.
689.	Witnesses—Definition.	693.	Competency—Distinction between evidence and instruments of evidence.
690.	Witnesses—Matters considered in same connection.		

§ 687. **Instruments of evidence generally.**—Instruments of evidence are “the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal.”<sup>1</sup> In other words, they are the means by which the facts are proved. They may be divided into three general classes: 1. Witnesses. 2. Real evidence. 3. Documents.

§ 688. **Scope of volume.**—It is our purpose, in this volume, to treat of such instruments, and matters closely connected therewith. In so doing it will be shown how such instruments are obtained; and their character, the manner and extent of their use, their competency and admissibility, and their effect, will be considered. Certain matters of practice will also be considered in connection with the discussion of the production, inspection and use of such instruments. It may be that, according to the natural order, the subject of real evidence would precede that of witnesses, yet it will be more convenient to treat of witnesses first, as it is usually by means of witnesses that both real and documentary evidence is presented to the tribunal.

<sup>1</sup> 1 Best Ev. 184, § 123.

**§ 689. Witnesses—Definition.**—"A witness is a means or instrument of evidence; that is, of unwritten or oral evidence. His function is to inform the tribunal or officer before whom he testifies as to matters of fact."<sup>2</sup> Ordinarily, when the term "witness" is used, it means one who gives oral evidence commonly called testimony;<sup>3</sup> but this may be given *viva voce* in open court, or before a magistrate or other proper officer under proper oath or affirmation,<sup>4</sup> although it must relate in some way to his knowledge of matters in a cause before a court or under judicial investigation. The term has a more extensive popular meaning, and is sometimes used in other senses even in the law, but this is its ordinary meaning in the law of evidence.

**§ 690. Witnesses—Matters considered in same connection.**—Instruments of evidence, as well as evidence itself, are sometimes divided into two classes—written and unwritten, or oral,<sup>5</sup> and by the latter class is usually meant the testimony of witnesses. In considering the subject of witnesses and their testimony incidental or closely related questions of practice will also be considered; and the method of procuring their attendance and testimony; their compensation; their competency; the practice of separating and limiting the number of witnesses; the examination of witnesses, including the manner of eliciting their testimony, objecting and excepting, and the like; the impeachment and corroboration of witnesses, and the manner of taking and using depositions will also be discussed.

**§ 691. Real evidence.**—Real evidence is evidence from things. It has elsewhere been defined as that which is addressed to the senses of the tribunal by presentation of an object to the tribunal for inspection.<sup>6</sup> As part of the general subject of real evidence, or in connection with it, inspection, view and experiments will also be treated.

**§ 692. Documentary evidence.**—An ordinary writing on paper or the like is a document, but, as already shown, the term document includes much more.<sup>7</sup> A document may also be real evidence, although,

<sup>2</sup> 19 Am. Law Rev. 583.

<sup>3</sup> *United States v. Wood*, 14 Pet. (U. S.) 430, 445. See, also, *Barker v. Coit*, 1 Root (Conn.) 223.

<sup>4</sup> Thus, it has been held that an affiant or deponent as to matters undergoing judicial investigation, whose testimony is taken by depo-

sition, or the like, to be used in such proceeding in court, is a witness. *Bliss v. Shuman*, 47 Me. 248, 252; *Abshire v. Mather*, 27 Ind. 381.

<sup>5</sup> See 3 Taylor Ev. (Chamberlayne's Ed.) 809, § 1233.

<sup>6</sup> See Vol. I, § 24.

<sup>7</sup> See Vol. I, § 22.

of course, much real evidence is not documentary. In this volume an attempt will be made not only to describe and classify documentary evidence, but also to treat of the inspection, production and use of documents in evidence, including their authentication and the use of exemplified copies.

**§ 693. Competency—Distinction between evidence and instruments of evidence.**—It should be noted that a matter may be refused admission as evidence either because of some defect or objection in or to the instrument of evidence, or because of some objection to the evidence itself. In other words, it may be inadmissible because of the medium through which it comes, or because of some defect or objection in or to the instrument which renders the instrument itself incompetent, as well as where the evidence is inadmissible by reason of some rule of exclusion operating upon such evidence without reference to the particular witness or instrument through which it may happen to come.

Evidence is frequently spoken of, with questionable propriety perhaps, as competent or incompetent, as well as relevant or irrelevant, admissible or inadmissible, and sometimes these different terms are used without proper distinction. In any event, the competency of evidence is not necessarily the same thing as the competency of a witness. For instance, a witness may be competent, and at the same time particular testimony that he gives may be incompetent (using the term in the sense indicated) and inadmissible because it is irrelevant or relates to the contents of a written instrument, or for some other reason. So, while the testimony might be relevant and admissible if it came from a competent witness, it is inadmissible, over proper objection and showing, if the witness himself is incompetent; and he may not be allowed to testify at all. A document which might be relevant and admissible, if properly authenticated or the like, may likewise be inadmissible in the particular instance because it is itself incompetent as not being properly authenticated or the like. This distinction between the competency of the instrument and the competency of the evidence, while not always controlling, is frequently of great importance, especially where the instrument is a witness undertaking to give oral evidence or testimony. In the one case the objection is to the competency of the witness or instrument to speak at all upon the subject, in the other it is to the evidence. If a party calls a witness who is incompetent, or knowingly permits him to be exam-

ined without objection, he will generally be held to have waived all known objection to the competency of the witness,<sup>8</sup> and a waiver of such objection usually operates upon all the testimony of the witness and stands throughout the entire trial.<sup>9</sup> Another rule based upon and showing the distinction between the competency of the instrument and the competency of the evidence is that, whereas an offer to prove must usually be made by the examiner where the objection is to the evidence sought to be elicited, no offer is necessary where the objection is to the competency of the witness to testify at all, and not as to the competency of the particular testimony.<sup>10</sup> Other illustrations might be given, but these are sufficient to show that there is such a distinction as the one stated, and that it is often of great importance that it should be observed.

<sup>8</sup> *Varick v. Jackson*, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571, and note; *Donelson v. Taylor*, 8 Pick. (Mass.) 390, 392; *Seip v. Storch*, 52 Pa. St. 210; *Stockton v. Demuth*, 7 Watts (Pa.) 39, 32 Am. Dec. 735.

<sup>9</sup> *Choteau v. Thompson*, 3 Ohio St. 424; *Beall v. Lynn*, 6 Harr. & Johns. (Md.) 336. But introducing evidence to break the force of testimony of an incompetent witness already objected to as incompetent may not amount to a waiver. *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384,

24 N. E. 86, 375. See, also, *Boylan v. Meeker*, 4 Dutch. (N. J.) 274; *Carpenter v. Ginder*, 1 Wis. 243.

<sup>10</sup> *State v. Thomas*, 111 Ind. 515, 518, 13 N. E. 35; *Sullivan v. Sullivan*, 6 Ind. App. 65, 68, 32 N. E. 1132. See as to objections and the practice where the witness is mentally competent, but is incompetent as to particular subjects, *John v. Hatfield*, 84 Ind. 75, 77; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

## CHAPTER XXXI.

### ATTENDANCE AND COMPENSATION OF WITNESSES.

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694.	Securing Attendance—By Subpoena—In general.	703.	Time of Contempt.
695.	Tendering witness fees and expenses.	704.	To punish for contempt subpoena must be regular in form and service.
696.	Subpoena must be served a reasonable time before trial—Continuance.	705.	What excuses one from obeying a subpoena.
697.	Who compelled to attend.	706.	Fees and compensation—In general.
698.	Writ of habeas corpus testificandum.	707.	Time for which compensation allowed.
699.	Recognizance.	708.	Rule where witness is under recognizance or is committed.
700.	Subpoena duces tecum—In general.	709.	Rule in criminal cases.
701.	What persons compelled to produce documents.	710.	Rule as to experts.
702.	Failure or refusal to attend—Contempt of Court.		

§ 694. **Securing attendance—By subpoena—In general.**—The attendance of witnesses at the trial of a cause is secured by serving the witness with a subpoena directing him to appear at a designated place and time to testify concerning the cause described in the subpoena.<sup>1</sup>

<sup>1</sup> A subpoena is a "process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein

mentioned." Bouvier Law Dict., as quoted in *Alexander v. Harrison*, 2 Ind. App. 47, 53, 28 N. E. 119.

A subpoena ticket to attend the supreme court, without stating the place where, has been held good. *People v. Van Wyck*, 2 Cal. (N. Y.) 333. But see *State v. Butler*, 8 Yerg.

The issuance of a subpoena, in a proper case and under proper circumstances, is a matter of right, and not one within the court's discretion.<sup>2</sup> The manner in which the subpoena is served on a witness is regulated by statute in the different states, but generally it is accomplished either by reading the subpoena to the witness or leaving a copy at his last and usual place of residence.<sup>3</sup> It must give the witness a reasonable time in which to prepare to attend the court.<sup>4</sup> But subpoenas are frequently issued to witnesses to appear forthwith, especially if they have already been subpoenaed and failed to appear. And, where it develops during the progress of the trial that other persons have knowledge of important and competent matters, a subpoena may be issued requiring them to attend *instantly*. The writ of subpoena suffices for only one sitting or term of the court, and if the case goes over there must usually be a new summons for the witness, unless he is sworn and ordered to return.

(Tenn.) 83. See article on attendance of witnesses at common law, 1 Law Rev. 284. But a person present in court, whether a party or not, may be called as a witness. *Goodfaster v. Voris*, 8 Iowa, 334; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; *Blackburn v. Hartgreave*, 2 Lewin C. C. 259; *Rex v. Saddler*, 4 Car. & P. 218.

<sup>2</sup> *Edmondson v. State*, 43 Tex. 230.

<sup>3</sup> *Smith v. Barger*, 9 Yerg. (Tenn.) 322. The sheriff is usually the proper officer to serve a subpoena, but it is usually provided that a party, or any one for him, may serve it, the sheriff's return usually being proof of service in the former case, and an affidavit of service being required if the service is not by the officer.

A witness is bound to obey a subpoena directed to him, no matter by what means it comes to his hands. *Chicago, &c. R. Co. v. Dunning*, 18 Ill. 494. A subpoena for a witness may be directed by a justice of the peace to an indifferent person to serve. *Smith v. Wilbur*,

35 Vt. 133. See, also, *Chicago, &c. R. Co. v. Dunning*, 18 Ill. 494; *Laramore v. Bobb*, 114 Mo. 446, 21 S. W. 922 (by party).

<sup>4</sup> See post § 696; *Hammond v. Stewart*, 1 Str. 510; *Chalmers v. Melville*, 1 E. D. Smith (N. Y.) 502. A witness is entitled to reasonable time for travel, availing himself of the usual modes of conveyance. He cannot be required to travel on Sunday, nor can he limit his travel to 30 miles per day. *Wilkie v. Chadwick*, 13 Wend. (N. Y.) 49. Service in the forenoon to attend in the afternoon has been held not to be a sufficient length of time. *Barber v. Wood*, 2 Moo. & R. 172. The inability of a witness to attend court must be decided in reference to the modes of traveling which are in use in the community. If there are modes not impracticable, and it does not appear that they were not in the power of the party summoned, his non-attendance cannot be attributed to inability. *Eller v. Roberts*, 3 Ired. (N. Car.) 11.



**§ 695. Tendering witness fees and expenses.**—In order to secure the attendance of witnesses in civil cases it is sometimes provided by statute that the fees and expenses must be tendered to the witness before he is obliged to attend; but other statutes provide that if the witness resides in the county his fees need not be paid or tendered in advance.<sup>5</sup> In criminal cases the state is not, as a general rule, required to tender fees.<sup>6</sup>

**§ 696. Subpoena must be served a reasonable time before trial—Continuance.**—A subpoena, as already stated,<sup>7</sup> should be served a reasonable time before trial, so that attendance may not greatly inconvenience the witness. Statutes in most of the states provide for this, and many of them require an allowance of one day for every certain number of miles distance from the abode of the witness to the place of trial. And it has been held that at least one day's notice is necessary, no matter how small the distance.<sup>8</sup> If the subpoena is not procured in time for the officer to find the witness, or for the witness to attend, and though important rights may be sacrificed, a continuance on account of his absence will usually be refused.<sup>9</sup> And a party cannot rely on the fact that his adversary has subpoenaed the witness, and secure a continuance if he does not appear, or has been excused by the adversary.<sup>10</sup>

**§ 697. Who compelled to attend.**—All competent witnesses within the jurisdiction of the court may be compelled to attend, unless the court, for sufficient reasons, excuses attendance. Some exceptions to the above are, it seems, ambassadors and other foreign representa-

<sup>5</sup> See note in 39 L. R. A. 121, et seq. As to the rules in the federal courts, and the right to compel attendance if the witness resides within one hundred miles, no matter in what district, see U. S. R. S. §§ 876, 877, 878, 848, 879-881.

<sup>6</sup> *Rex v. Ring*, 8 T. R. 585; *Rex v. Cboke*, 1 C. & P. 321; *United States v. Moore*, Wall. C. C. 23; note in 39 L. R. A. 116, 126; *Huckins v. State*, 61 Neb. 891, 86 N. W. 485. So in many of the states the common law rule requiring the state to name or produce all witnesses

applies. *Keller v. State*, 123 Ind. 110, 23 N. E. 1138.

<sup>7</sup> See ante § 694.

<sup>8</sup> *Scammon v. Scammon*, 33 N. H. 52. See, also, *Barber v. Wood*, 2 Moo. & R. 172; *Sims v. Kitchen*, 5 Esp. 46.

<sup>9</sup> *Miller v. State*, 42 Ind. 544; *Merrick v. State*, 63 Ind. 327; *Leary v. Knave*, 66 Ind. 220.

<sup>10</sup> *Hutts v. Shoaff*, 88 Ind. 395. Nor can any adverse presumption ordinarily arise from the failure of the other party to call a witness known to both and who is accessible to

tives;<sup>11</sup> also the President of the United States<sup>12</sup> and the governors of the states,<sup>13</sup> who cannot, it has been held, be compelled by attachment to attend and testify when it would interfere with their official duties.

§ 698. **Writ of habeas corpus testificandum.**—Where the witness whom it is desired to serve is confined in prison, or is in the military or naval service, his attendance may be secured by a writ of habeas corpus ad testificandum.<sup>14</sup> Any court having general authority to issue a writ of habeas corpus may grant the above writ. In civil cases this writ is secured upon affidavit; in criminal cases the prosecuting attorney is not required to make affidavit. The writ is a command from the court, directed to the person having the prisoner in custody, to bring the prisoner into court to testify.<sup>15</sup> This writ may also be used to secure the attendance of one confined as a lunatic.<sup>16</sup>

§ 699. **Recognizance.**—In criminal cases, where the attendance of a certain person is necessary as a witness, and such person is not to be trusted to appear voluntarily, the court has power to require him to enter into a recognizance for his appearance, or, if he refuse, to commit him until his examination in court.<sup>17</sup> Such a law does not deprive a witness of his liberty without due process of law.<sup>18</sup> It has been held, however, that a justice of the peace does not have power to compel such a recognizance where there is no statute authorizing it.<sup>19</sup>

§ 700. **Subpoena duces tecum—In general.**—Where, in addition

both. *Keller v. State*, 123 Ind. 563, 23 N. E. 1138; *Coleman v. State*, 111 Ind. 563.

<sup>11</sup> *In re Dillon*, 7 Sawyer (U. S.) 561.

<sup>12</sup> *2 Burr's Trial* (Hopkins & Earle) 536.

<sup>13</sup> *Thompson v. German, &c. R. Co.* 22 N. J. Eq. 111.

<sup>14</sup> *State v. Adair*, 68 N. Car. 68; *People v. Willard*, 92 Cal. 482, 28 Pac. 585; *ex parte Marmaduke*, 91 Mo. 228, 60 Am. R. 250.

<sup>15</sup> *State v. Kennedy*, 20 Iowa, 372; *ex parte Marmaduke*, 91 Mo. 228, 60 Am. R. 250.

<sup>16</sup> *Fennell v. Tait*, 1 Crompt. M. & R. 584.

<sup>17</sup> *Means v. State*, 10 Tex. App. 16; *U. S. v. Butler*, 1 Cranch (C. C.) 422; *State v. Zellers*, 2 Halst. (N. J.) 220; *ex parte Shaw*, 61 Cal. 58; *State v. Grace*, 18 Minn. 398; *Comfort v. Kittle*, 81 Iowa, 79, 46 N. W. 988; *Bickley v. Com.* 2 J. J. Marsh. (Ky.) 572; *State v. Calhoun*, 99 Ala. 279, 13 So. 325; *Evans v. Rees*, 12 Ad. & El. 55.

<sup>18</sup> *In re Petrie*, 1 Kans. App. 184, 40 Pac. 118.

<sup>19</sup> *Clayborn v. Tompkins*, 141 Ind. 19, 40 N. E. 121.

to the oral testimony to be given by the witness, he has in his possession any deeds or writings which are desired to be used in evidence, he may be served with a subpoena duces tecum, in which will be described the deeds or writings which he is required to produce.<sup>20</sup> The writ should describe the writings with such definiteness that there can be no misunderstanding as to just what papers are desired.<sup>21</sup> In early practice the writ was used only where the papers were in the possession of some third person; but statutes today frequently embrace parties to the suit also.<sup>22</sup> The court, and not the witness, is to determine whether the papers are admissible, and whether they should be produced.<sup>23</sup> It has been held that the writ should not be made use of to secure writings merely to refresh the memory of a witness.<sup>24</sup>

**§ 701. What persons compelled to produce documents.**—As already shown, persons having writings or papers under their control and possession may be compelled to produce them in a proper case, and this is true although they are owned by other persons.<sup>25</sup> The rule applies in general to officers of a corporation as well as to others,<sup>26</sup> but

<sup>20</sup> *Mott v. Consumers' Ice Co.* 52 How. (N. Y.) Pr. 244; *Duke v. Brown*, 18 Ind. 111; *Amey v. Long*, 9 East, 483, 6 Esp. 116. See *Truesdale Co. v. Hoyle*, 39 Ill. App. 532. Pieces of sheet iron corresponding to the shape of rolls used in rolling steel rails are not the subjects of a subpoena duces tecum. *Johnson, &c. Co. v. North Branch, &c. Co.* 48 Fed. 191.

<sup>21</sup> *In re O'Toole*, 1 Tuck. (N. Y.), 39; *United States v. Babcock*, 3 Dill. (U. S.) 566. A writ to produce "all papers touching or concerning the matters in dispute has been held not sufficient. *Ex parte Brown*, 7 Mo. App. 484; *United States v. Hunter*, 15 Fed. 712. See, also, *Whitman v. Weller*, 39 Ind. 515; *United States v. Hunter*, 15 Fed. 712.

<sup>22</sup> *Murray v. Elston*, 23 N. J. Eq. 212; *Hanseman v. Sterling*, 61 Barb. (N. Y.) 347. But see *Duke v. Brown*, 18 Ind. 111.

<sup>23</sup> *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226; *Bull v. Loveland*, 10 Pick. 9; *Chaplain v. Briscoe*, 13 Miss. 198; *Sherman v. Barrett*, 1 McMull. (S. Car.) 147; *United States v. Hunter*, 15 Fed. 712; *Doe v. Kelly*, 4 Dowl. 273; *Amey v. Long*, 9 East, 48.

<sup>24</sup> *United States v. Tilden*, 10 Ben. (U. S.) 566, 570. See post §§ 858, 868.

<sup>25</sup> *Corsen v. Dubois*, 1 Holt, 239. See, also, *Amey v. Long*, 1 Campb. 14. But compare *Bank of Utica v. Hilliard*, 5 Cow. (N. Y.) 153. The person calling the witness is under no obligation to have the witness sworn. *Martin v. Williams*, 18 Ala. 190. But he may be sworn if he desires to show that the writing is not material. *Aikin v. Martin*, 11 Paige (N. Y.) 499.

<sup>26</sup> *Central Bank v. White*, 37 N. Y. S. 297. See also *Wertheim v. Continental, &c. Co.* 15 Fed. 716, and note.

the rule differs somewhat as to public documents, for as to them the statutes provide that duly certified copies of their records will suffice,<sup>27</sup> and public injury or inconvenience would frequently result from taking the originals into court.

**§ 702. Failure or refusal to attend—Contempt of court.**—If the witness, being duly summoned, willfully neglects to appear, he is guilty of contempt of court.<sup>28</sup> The court will generally order the issuance of an attachment for such a witness.<sup>29</sup> The delinquent witness

<sup>27</sup> *Corbett v. Gibson*, 16 Blatch. (U. S.) 334; *Delaney v. Regulators*, 1 Yeates (Pa.) 403; *Morris v. Creel*, 2 Va. Cas. 49.

<sup>28</sup> *Ex parte Judson*, 3 Blatchf. (U. S.) 89; *United States v. Moore*, Wall. (C. C.) 23; *Mitchell v. Maxwell*, 2 Fla. 594; *Chicago, &c. Co. v. Dunning*, 18 Ill. 494; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; *Bleecker v. Carroll*, 2 Abb. Pr. (N. Y.) 82; *Woods v. De Figuiere*, 1 Robt. (N. Y.) 641; *Icehour v. Martin*, Busb. (N. Car.) 478; *Jackson v. Justices*, 1 Va. Cas. 314; *ex parte Humphrey*, 2 Blatchf. (U. S.) 228; *ex parte Beebees*, 2 Wall. Jr. (U. S.) 127; *Green v. Mate*, 17 Fla. 669; *Com. v. Carter*, 11 Pick. (Mass.) 277; *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820; *Wilson v. State*, 57 Ind. 71; *State v. Trumbull*, 1 South. (N. J.) 139; *Stephens v. People*, 19 N. Y. 549; *Respublica v. Duane*, 4 Yeates (Pa.) 347; *Humphrey v. Knapp*, 41 Conn. 313; *Tredway v. Van Wegenen*, 91 Iowa, 556, 60 N. W. 130. A witness appeared in obedience to a subpoena which did not command him to attend from day to day, or to depart without leave of court, and after one day's attendance departed without leave. Held, that he was not guilty of contempt. *In re Spencer*, 4 McArth. (D. C.) 433. But

see *Howe v. Welsh*, 11 N. Y. Civ. Proc. 444.

<sup>29</sup> *Wilson v. State*, 57 Ind. 71; *State v. Newton*, 62 Ind. 517; *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820; *Voss v. Luke*, 28 Fed. Cas. No. 17014; *Reg v. Russell*, 7 Dowl. 693.

Where an attachment against an absent witness, on account of her condition, has been refused, and the accused fails to apply for a continuance, no relief can be given on appeal. *State v. Benjamin*, 7 La. Ann. 47.

The absence of a subpoenaed witness may be proved by parol: record evidence need not be produced. *Cogswell v. Meech*, 12 Wend. (N. Y.) 147.

After the announcement of the counsel on each side that the testimony is closed, it has been held in the discretion of the presiding judge to issue an attachment to compel the attendance of an absent witness. *Stephens v. People*, 19 N. Y. 549.

If a witness, against whom an attachment has issued, arrives before service of the process, and makes a reasonable excuse, the court may countermand the attachment on payment of the costs of issuing it. *United States v. Scholfield*, 1 Cranch (C. C.) 130.

It has been held as a matter dis-

may also render himself liable to an action for damages,<sup>30</sup> and, in some jurisdictions and cases, to a forfeiture<sup>31</sup> or prosecution by indictment.<sup>32</sup>

**§ 703. Time of contempt.**—It was formerly held that before a witness was considered as guilty of a contempt the cause should be called, the jury sworn, and the witness called upon to testify.<sup>33</sup> The rule to-day, however, is that the witness is deemed guilty of contempt when it is clearly shown that he is absent with intent to disobey the writ of subpoena.<sup>34</sup>

**§ 704. To punish for contempt subpoena must be regular in form and service.**—In order to render the witness liable for contempt or a civil suit the subpoena must be regular in form, and everything necessary to its legal service must have been done.<sup>35</sup> It must be shown by

cretionary with the court whether or not to issue an attachment for a witness that will not be reviewed on appeal. *People v. County Commissioners*, 7 Cal. 190.

<sup>30</sup> *Hurd v. Swan*, 4 Den. (N. Y.) 75; *Robinson v. Tuell*, 4 Cush. (Mass.) 249; *West v. Tuttle*, 11 Wend. (N. Y.) 639; *Prentiss v. Webster*, 2 Dougl. (Mich.) 5; *Hasbrouck v. Baker*, 10 Johns. (N. Y.) 248; *Connett v. Hamilton*, 16 Mo. 442; *Yates v. Mullen*, 23 Ind. 562, 567. In an action for damages, for failing to obey a subpoena, the question whether it was served or not is a matter of proof for the plaintiff on the trial. *McCall v. Butterworth*, 8 Iowa, 329.

<sup>31</sup> The Alabama statute imposing a forfeiture on a defaulting witness does not give the party summoning the witness any right to this sum, but it is imposed as a punishment on the delinquent. *Maclin v. Wilson*, 21 Ala. 670.

<sup>32</sup> *Drake v. State*, 60 Ala. 62; *Duke v. Given*, 4 Yerg. (Tenn.) 478; *State v. Dill*, 2 Sneed (Tenn.) 414; *State v. Butler*, 8 Yerg. (Tenn.) 83; *Nelson v. Ewell*, 2 Swan (Tenn.)

271. In Vermont, a witness who has had his fee for travel and one day's attendance tendered, and who attended one day and then left the court, is not liable for the penalty under the statute, if the subpoena was served by an indifferent person, who was not named in the subpoena. *Mattocks v. Wheaton*, 10 Vt. 493. The summary proceeding for the punishment of defaulting witness may be had after the termination of the suit in which the default occurred. *Robbins v. Graham*, 25 N. Y. 588.

<sup>33</sup> *Bland v. Swafford*, *Peake's Cas.* 60.

<sup>34</sup> *Wilson v. State*, 57 Ind. 71. See, also, *Barrow v. Humphreys*, 3 B. & Ald. 598.

<sup>35</sup> *United States v. Caldwell*, 2 Dall. (U. S.) 333, 334; *Kinzey v. King*, 6 Ired. (N. Car.) 76; *Durden v. State*, 32 Ala. 579; *Dickinson v. Kincaid*, 11 Humph. (Tenn.) 72. See, also, *White v. Morgan*, 119 Ind. 338, 21 N. E. 968; *Chambers v. Oehler*, 107 Iowa, 155, 77 N. W. 853; *State v. Hopper*, 71 Mo. 425. In a civil case, before the witness will be punished for contempt, it must be

affidavit or otherwise that the writ of subpoena was seasonably and personally served on the witness, and that, when required by statute, his fees were paid or tendered, or the tender expressly waived.<sup>36</sup> But the return of the officer who subpoenaed him may be a sufficient basis on which to found an attachment against him, at least where the statute makes such return proof of service.<sup>37</sup>

**§ 705. What excuses one from obeying a subpoena.**—Extreme poverty<sup>38</sup> or sickness of the witness, or of a member of his family, may excuse him from obeying a subpoena.<sup>39</sup> So residing more than one hundred miles from a United States Court will excuse the witness from attending on subpoena<sup>40</sup> in that court. So also, it seems,

made to appear that his fees were paid or tendered when that is necessary. *Beaulieu v. Parsons*, 2 Minn. 37; *Mattocks v. Wheaton*, 10 Vt. 493; *Ogden v. Gibbons*, 2 South (N. J.) 598; *McKeon v. Lane*, 1 Hall (N. Y.) 319. So if the witness lives without the county in which the trial is held his fees must be tendered. *Wayman v. Hazzard*, 2 Ind. 156. A witness has been held not liable to the statutory penalty for not attending when subpoenaed, unless his evidence is material; and the admission of the party suing for the penalty that the witness knew nothing about the matter in controversy is admissible in a suit for such penalty. *Courtney v. Baker*, 3 Den. (N. Y.) 27.

<sup>36</sup> *Garden v. Creswell*, 2 M. & W. 319.

<sup>37</sup> *Wilson v. State*, 57 Ind. 71; *Cutler v. State*, 42 Ind. 244.

<sup>38</sup> Mere poverty, as a rule, is not an excuse in some jurisdictions, since the law provides generally for fees in advance. *People v. Davis*, 15 Wend. 602.

<sup>39</sup> *People v. Davis*, 15 Wend. (N. Y.) 602; *Jackson v. Perkins*, 2

Wend. (N. Y.) 308; *Butcher v. Coates*, 1 Dall. (U. S.) 340; *State v. Hatfield*, 72 Mo. 578; *Cutler v. State*, 42 Ind. 244; *Slaughter v. Birdwell*, 1 Head (Tenn.) 341; *Foster v. McDonald*, 12 Heisk. (Tenn.) 619.

Where a party has been served with a subpoena duces tecum it is no excuse for failing to obey by saying that he delivered the documents sought to be produced into the hands of his counsel. *Edison, &c. Co. v. U. S. &c. Co.* 44 Fed. 294. A witness who is lame but otherwise in good health will not be excused. *Pipher v. Lodge*, 16 S. & R. (Pa.) 214. The court will properly refuse to issue an attachment for a witness who is in a dying condition or so far gone in pregnancy as to be unable to attend. *State v. McCarthy*, 43 La. Ann. 541, 9 So. 493. That a witness deems his testimony immaterial does not excuse non-attendance. *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226.

<sup>40</sup> *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 694. The former circuit court of the District of Columbia had power in civil causes to issue an attachment for a witness residing in the states adjoining the

that if the witness has reasonable ground to believe that he will not be wanted at the trial,<sup>41</sup> or has been excused by the attorney of the party who summoned him,<sup>42</sup> he will be excused. The fact that attendance would cause great personal inconvenience, however, ordinarily affords no excuse for non-attendance.<sup>43</sup>

In many jurisdictions those procuring the absence of witnesses, or preventing them from giving their testimony, have also been punished for contempt.<sup>44</sup> And it is probably the rule in all jurisdictions that the court has power to punish as for contempt in such cases.

**§ 706. Fees and compensation—In general.**—Witnesses who attend court in obedience to a subpoena are entitled to compensation and reasonable traveling expenses.<sup>45</sup> The fees are fixed by statutes,

district, not exceeding one hundred miles distant. *Voss v. Luke*, 1 Cranch (C. C.) 331; *Gorman*, ex parte 4 Cranch (C. C.) 572.

<sup>41</sup> *Rex v. Sloman*, 1 Dowl. 618.

<sup>42</sup> *Farrah v. Keat*, 6 Dowl. 470.

<sup>43</sup> *Pipher v. Lodge*, 16 Serg. & R. (Pa.) 214.

<sup>44</sup> *Savin's Case*, 131 U. S. 267, 9 Sup. Ct. 699; *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148; *McConnell v. State*, 46 Ind. 298; *Whittem v. State*, 36 Ind. 196; *Whetstone ex parte*, 9 Utah, 156, 36 Pac. 633; *In re Nickell*, 47 Kans. 738, 28 Pac. 1076, 27 Am. St. 315; *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. 691, 36 L. R. A. 254.

<sup>45</sup> *Dodge v. Stiles*, 26 Conn. 463; *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 271; *Brown v. Moore*, 3 J. J. Marsh. (Ky.) 306; *Farmer v. Storer*, 11 Pick. (Mass.) 241; *Hurd v. Fogg*, 22 N. H. 98; *De Benneville v. De Benneville*, 1 Binn. (Pa.) 46; *Price v. McGee*, 1 Brev. (S. Car.) 455; *Taylor v. McMahan*, 2 Bailey (S. Car.) 131; *Gray v. Alexander*, 7 Humph. (Tenn.) 16; *Hardy v. De Leon*, 7 Tex. 466; *Russell v. Ashley*, *Hempst.* (U. S.) 546; *Angell v.*

*Union County*, 8 Bradw. (Ill. App.) 244; *Hutchins v. Eden*, 3 Har. & M. (Md.) 101; *Mathes v. Bennett*, 21 N. H. 204; *Lagrosse v. Curran*, 10 Phila. (Pa.) 140; *Johnson v. Wideman*, 1 Cheves (S. Car.) 26; *Davis v. State*, 3 Lea (Tenn.) 376.

When a party, whether ignorant-ly or oppressively, summons witnesses in a cause which is not at issue, or is not for trial at the term to which the subpoena is returnable, he will be taxed with the costs of their attendance; and the advice of counsel cannot protect him. *Porter v. Williams*, 22 Ala. 525. One is not authorized to certify to his attendance as a witness unless he comes into the courthouse and is in actual attendance there. *Kennedy v. Wright*, 34 Me. 351. It has also been held that a witness is not bound to attend court unless his fees for travel and one day's attendance are paid or tendered to him. At the close of each day if his fees for the next day are not paid he has the right to return home; but if the case has not terminated he must first give notice to the party who has summoned

and the witness is allowed a regular per diem compensation,<sup>46</sup> and mileage in proportion to the distance necessarily traveled in going to and returning from the place of trial.<sup>47</sup> Where a party to a suit is called by the opposite party as a witness he is usually entitled to compensation.<sup>48</sup> And it has often been held that a witness has a right

him, or his attorney, of his intention to leave unless his fees are paid. *Bliss v. Brainard*, 42 N. H. 255. See, also, *Ogden v. Gibbons*, 5 N. J. L. 518. A witness is not bound to refund fees paid him upon service of a subpoena, because the cause is settled or put off, and he is notified that he need not attend. *Ford v. Monroe*, 6 How. Pr. (N. Y.) 204. A postmaster's clerk is not a "clerk or officer of the United States," so as to be required to attend court as a witness for the government and receive only his necessary expenses, but he is entitled to the same fees as any witness not in the employ of the government. *In re Waller*, 49 Fed. 271.

<sup>46</sup> *Allbright v. Corley*, 54 Tex. 372; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 230; *Holden v. Shove*, 1 R. I. 287; *Willink v. Reckle*, 19 Wend. (N. Y.) 82; *Kennedy v. Wright*, 34 Me. 351; *Leigh v. Hodges*, 4 Ill. 15; *Hodges v. Nance*, 1 Swan (Tenn.) 57; *Barton v. Bird*, 1 Overt. (Tenn.) 66; *Brown v. Moore*, 3 J. J. Marsh. (Ky.) 306; *Ogden v. Gibbons*, 2 South. (N. J. L.) 518.

<sup>47</sup> *Dutcher v. Justices, &c.* 38 Ga. 214; *Lyon Co. Comrs. v. Chase*, 24 Kans. 774; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Lamb v. Coe*, 19 Wend. (N. Y.) 127; *Albany v. Derby*, 30 Vt. 718; *Meffert v. Dubuque, &c. R. Co.* 34 Iowa, 430; *Union, &c. R. Co. v. Harris*, 29 Kans.

275; *Kingfield v. Pullen*, 54 Me. 398; *Wilson v. Knox*, 12 N. H. 347; *Crawford v. Abraham*, 2 Ore. 163, 165; *Speigner v. Cooner*, 9 Rich. (S. Car.) 120. Traveling fees to a witness in a circuit court are allowable only to the extent a subpoena will run; that is, for any distance within the district, but for not exceeding 100 miles from the place of trial, unless the distance is wholly within the district. *Anonymous*, 5 Blatchf. (U. S.) 134; *Woo-ster v. Hill*, 44 Fed. 819. A witness residing more than 100 miles from the place of trial is beyond the reach of a subpoena, and the party issuing one to him must pay the costs thereof. *Russell v. Ashley*, 1 Hempst. (U. S.) 546. A witness who resides in the place where the court is held is not entitled to travel fees. *Jackson v. Hoagland*, 1 Wend. (N. Y.) 69. Where a witness travels by rail to the place of trial, in order to escape the inconvenience and unpleasantness of travel by stage, though the distance by stage be much shorter, he will be allowed mileage only for such shorter distance. *State v. Ramsey*, 11 Mont. 245, 28 Pac. 258.

<sup>48</sup> *Bank v. New York, &c. Co.* 4 Paige (N. Y.) 125, 127; *George v. Starrett*, 40 N. H. 135; *Bonner v. People*, 40 Ill. App. 628. But not where he procures himself to be subpoenaed. *Goodwin v. Smith*, 68 Ind. 301; *Reader v. Smith*, 88 Ind. 440. A party who attends the trial



of action to recover his fees,<sup>49</sup> but this is not true in all jurisdictions, at least, in the first instance.<sup>50</sup> Witnesses subpoenaed, though not examined, and witnesses examined, though not subpoenaed, are entitled to pay.<sup>51</sup>

**§ 707. Time for which compensation allowed.**—A witness is entitled to his fees during the whole time of his actual attendance dur-

of his cause solely as a witness, and is sworn and examined as such, is entitled to witness fees. *Van Dusen v. Bissell*, 29 How. Pr. (N. Y.) 481. If the presence of a party as a witness has not been asked by the opposite party, he will not be entitled to either fees or mileage. *Street v. The Progresso*, 48 Fed. 239.

<sup>49</sup> *Burns v. Howard*, 68 Ala. 352; *Worland v. Outten*, 3 Dana (Ky.) 477; *Leighton v. Twombly*, 9 N. H. 483; *Baker v. Brill*, 15 Johns. (N. Y.) 260; *Standley v. Hodges*, Cam. & N. (N. Car.) 330; *Belden v. Snead*, 84 N. Car. 243; *Utt v. Long*, 6 W. & S. (Pa.) 174; *Wetherspoon v. Killough*, Mart. & Y. 8 Tenn. 38; *Flores v. Thorn*, 8 Tex. 377; *Hill v. White*, 1 Ala. 576; *Crozier v. Bevy*, 27 Ga. 346; *Holbrook v. Cooley*, 25 Minn. 275; *Fuller v. Mattice*, 14 Johns. (N. Y.) 357; *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Sweany v. Hunter*, 1 Murph. (N. Car.) 181; *Bagley v. Clement*, 2 McCord (S. Car.) 244; *Harris v. Coleman*, 8 Tex. 278; *Crawford v. Crain*, 19 Tex. 145. A witness for the state in a prosecution against a party cannot bring suit on his certificate of attendance against the defendant after his conviction. *Nicolas v. Trickey*, 19 Ala. 92. The party summoning witnesses is liable for the costs of their attendance until the suit is disposed of by final

judgment; after that time their claim is against the party who is adjudged to pay costs. *Carter v. Wood*, 11 Ired. (N. Car.) 22. Witnesses summoned by one suing in forma paupens are entitled to their costs for attendance. Officers of the court only are included in the order authorized by the act of assembly. *Morris v. Rippey*, 4 Jones (N. Car.) 533.

<sup>50</sup> See *Hall v. County Comrs.* 82 Md. 618, 34 Atl. 317, 32 L. R. A. 449.

<sup>51</sup> *Farmer v. Storer*, 11 Pick. (Mass.) 241; *Hutchins v. Eden*, 3 Har. & M. (Md.) 101; *De Benneville v. De Benneville*, 1 Binn. (Pa.) 46; *Vence v. Speir*, 18 How. Pr. (N. Y.) 168; *Johnson v. Wideman*, 1 Cheves (S. Car.) 26; *Sloss Iron & S. Co. v. South Carolina, &c. R. Co.* 75 Fed. 106; *Pinson v. Atchison, &c. R. Co.* 54 Fed. 464. But fees of a witness subpoenaed and not used have been held not taxable against the other party. *Simpkins v. Atchison, &c. R. Co.* 61 Fed. 999. See, also, *Lillienthal v. Southern Cal. R. Co.* 61 Fed. 622. Witnesses called and sworn at the trial, if it is not done fraudulently and collusively, are entitled to their costs, though not subpoenaed. *Price v. McGee*, 1 Brev. (S. Car.) 455. The matter of taxing the costs of witnesses who were subpoenaed and were not called to testify on the trial, is a question largely within the discre-

ing the trial of the cause.<sup>52</sup> While the per diem allowance will be given for each day's actual attendance, only a single mileage allowance can be taxed.<sup>53</sup> Where a witness attends the trial of more than one case at the same time it has been held that he is entitled to have his fees taxed in each case.<sup>54</sup> If summoned by both parties in the same suit, however, it has been held that he is entitled to but one compensation.<sup>55</sup> Much, however, depends upon the governing statute.

**§ 708. Rule where witness is under recognizance or is committed.**—One who has been placed under a recognizance to appear as a witness in a public prosecution is in some jurisdictions entitled to receive from the county his fees for travel and attendance.<sup>56</sup>

tion of the trial court. *Chandler v. Beal*, 132 Ind. 596, 32 N. E. 597.

<sup>52</sup> *Whipple v. Cumberland Co.* 3 Story (U. S.) 84; *Gunnison v. Gunnison*, 41 N. H. 121; *Rogers v. Rogers*, 2 Paige (N. Y.) 458; *Carter v. Wood*, 11 Ired. (N. Car.) 22; *Abbott v. Johnson*, 47 Wis. 239; *Floyd County v. Black*, 65 Ga. 384; *Bliss v. Brainard*, 42 N. H. 255; *Thompson v. Hodges*, 3 Hawks (N. Car.) 318. Witnesses from a distance are entitled to fees for attendance on Sunday when they are detained over that day. *Schott v. Benson*, 1 Blatchf. (U. S.) 564; *Muscott v. Runge*, 27 How. Pr. (N. Y.) 85. Certified subpoena accounts are prima facie evidence of the number of days for which payment is due to a witness. *Robison v. Banks*, 17 Ga. 211. Where a cause is called, and the trial put off by the defendant, and he subsequently obtains a verdict, he is not entitled to more than one day's fees to witnesses. *Titus v. Bullen*, 6 Wend. (N. Y.) 562.

<sup>53</sup> *Hathaway v. Roach*, 2 Woodb. & M. (U. S.) 63. See, also, *Chicago City R. Co. v. Burke*, 102 Ill. App. 661.

<sup>54</sup> *Findley v. Wyser*, 1 Stew.

(Ala.) 23; *Robison v. Banks*, 17 Ga. 211; *Railroad Co. v. Johnson*, 108 Ind. 126, 10 N. E. 126 (same person defendant in each); *Taylor v. Vermont, &c. R. Co.* 1 Gray (Mass.) 422; *Batdorff v. Eckert*, 3 Pa. St. 267; *House v. Barber*, 10 Vt. 158; *Pulaski County v. Downer*, 10 Ark. 588; *Hardin v. Polk County*, 39 Iowa, 661; *McHugh v. Chicago, &c. R. Co.* 41 Wis. 79; *Parker v. Cartzler*, 5 McLean (U. S.) 4; *Hicks v. Brennan*, 10 Abb. Pr. (N. Y.) 304; *Flores v. Thorn*, 8 Tex. 377. But see *U. S. R. S. § 848*.

<sup>55</sup> *Renfro v. Kelly*, 10 Ala. 338. In North Carolina it has been held that a witness summoned by both parties is entitled to pay from both. *Peace v. Person*, 1 Murph. (N. Car.) 188.

<sup>56</sup> *Ex parte Mitchell*, 17 N. H. 501; *Markwell v. Warren County*, 53 Iowa, 422; *ex parte Johnson*, 1 Wash. C. C. 47. A witness residing in another state, who has been compelled, in this state, to recognize for his appearance here, is entitled to mileage from his place of residence. *Hutchins v. State*, 8 Mo. 288. A witness who, for want of surety to appear and testify, has been imprisoned, is entitled to daily

So, it has been held, a witness committed in default of bail is entitled to fees during the time of commitment.<sup>57</sup>

§ 709. **Rule in criminal cases.**—A witness for the defendant in a criminal case has, in most jurisdictions, no claim against the county for his fees.<sup>58</sup> Witness for the state in criminal cases, are, in some of the states, entitled to their fees.<sup>59</sup> But this is not true in all jurisdictions. In some of them the statute makes this depend upon a conviction, and the whole matter depends largely upon the statute of the particular jurisdiction.

§ 710. **Rule as to experts.**—Expert witnesses are not called to testify to facts, as are non-expert witnesses, but to matters of opinion, and as it requires particular skill in the matters in regard to which they are called to testify, it has been held that they have a right to demand and are properly allowed compensation for their services and loss of time,<sup>60</sup> but there is sharp conflict among the authorities on this subject. It has been held that extra compensation paid to an expert must be borne by the party calling him.<sup>61</sup> Such a witness may

compensation for the time of imprisonment. *Higginson's Case*, 1 Cranch (C. C.) 73. A witness from without the state who attends court as a witness for the state, in a criminal prosecution, is entitled to mileage for the distance traveled outside of the state at the same rate as that traveled within. *Westfall v. Madison County*, 62 Iowa, 427, 17 N. W. 614.

<sup>57</sup> *Robinson v. Chambers*, 94 Mich. 471, 54 N. W. 176, 20 L. R. A. 57, and note. But see *Markwell v. Warren County*, 53 Iowa, 422; *Hall v. Somerset County Com'rs*, 82 Md. 618, 34 Atl. 771, 32 L. R. A. 449.

<sup>58</sup> *Donnelly v. Johnson County*, 7 Iowa, 419; *Com. v. Williams*, 13 Mass. 501; *Howell v. Blackwell*, 7 Ga. 443.

<sup>59</sup> *Cuthbert v. Lewis*, 6 Ala. 262; *Nicolas v. Trickey*, 19 Ala. 92; *Sargent v. Cairns*, 36 Cal. 552; *United States* is not required to tender

fees in advance. In *re Stowor*, 63 Fed. 564. Witnesses at a preliminary examination on a criminal charge, before a justice of the peace, are entitled to fees from the county. *Johnson v. Porter*, 4 Greene (Iowa) 79. However, unless the statute expressly provides therefor a witness in behalf of the prosecution is not entitled to fees unless there is a conviction. *Commissioners of Shawnee v. Ballinger*, 20 Kans. 590.

<sup>60</sup> *Webb v. Page*, 1 Car. & K. 23; *Buchman v. State*, 59 Ind. 1, 26 Am. R. 75, note in 25 Am. R. 619; note in 27 L. R. A. 669. But see *Dixon v. People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116, and note; *Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459, 27 L. R. A. 669, and note.

<sup>61</sup> *Mark v. City of Buffalo*, 87 N. Y. 184; *The William Branfoot*, 52 Fed. 390; note in 27 L. R. A. 673.

be compelled to attend, but he cannot be compelled to make a preliminary examination of the matters involved to form a basis upon which to place his opinion, without extra compensation.<sup>62</sup>

<sup>62</sup> *Summers v. State*, 5 Tex. App. 365, 374; *Gaston v. Board, &c.* 3 Ind. 497; *Lyon v. Wilkes*, 1 Cow. (N. Y.) 591; *ex parte Dement*, 53 Ala. 389. In the case of *People v. Montgomery*, 13 Abb. Pr. (N. S.) (N. Y.) 207, the court said, in speaking of expert witnesses, that "a witness meets the requirements of a subpoena if he appears in court when required to testify, and gives proper impromptu answers to such questions as are there put to him. He cannot be required by virtue of the subpoena to examine the case,

to use his skill and knowledge to form an opinion, nor to attend, hear and consider the testimony given, so as to be qualified to give a deliberate opinion on a question of science arising upon such testimony; hence, a professional witness called as an expert, may be paid for his time, services, and expenses; and the question what amount is paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial, though it may, perhaps, affect his credit with the jury."

## CHAPTER XXXII.

### COMPETENCY OF WITNESS IN GENERAL.

Sec.		Sec.	
711.	Meaning of Term.	717.	The modern view.
712.	Rule.	718.	Competency as to knowledge.
713.	Object of excluding incompetents.	719.	Imperfect recollection.
714.	Development of the law as to competency.	720.	Raising the question of competency.
715.	Development of the law as to competency—Continued.	721.	Time of objecting to competency.
716.	Social or race disqualifications.	722.	Trying the question of competency.

§ 711. **Meaning of Term.**—By competency of a witness is meant the presence of those characteristics which render the witness legally fit and qualified to give testimony in a court of justice. The term competency is also applied, in the same sense, to documents or other written evidence.<sup>1</sup> So, as elsewhere shown,<sup>1\*</sup> evidence is frequently spoken of as competent or incompetent, but we are here dealing with the competency of witnesses, or instruments of evidence, rather than with the evidence itself on the question as to its admissibility.

§ 712. **Rule.**—If a witness labors under certain disqualifications he will be rejected as an incompetent witness and his testimony will not be received. The ordinary disqualifications at common law were: imbecility, interest, crime, refusal to be sworn or to acknowledge the

<sup>1</sup> Black Law Dict., Tit. Competency; 1 Bouvier Law Dict. (Rawle's Ed.) 375.

<sup>1\*</sup> See ante § 693.

sanction of an oath and the position of the proposed witness as a party to the controversy under investigation.<sup>2</sup>

§ 713. **Object of excluding incompetents.**—The main reason for excluding the testimony of witnesses laboring under disqualifications is, that such testimony would, if presented to the jury, be unsafe or tend to mislead, rather than to accomplish the ends of justice. The theory is not that such persons may not sometimes state the truth, but that it would ordinarily not be safe to rely on their statements.

In judicial investigations, the motives to prevaricate and to fabricate, are greater than in the ordinary affairs of life, and from the very nature of things there is not such a full opportunity to inquire into character; so, to attain the ends of justice, certain safeguards must be maintained, and one wise means, as evolved by the law, is through the exclusion of certain incompetents.

§ 714. **Development of the law as to competency.**—Professor Thayer<sup>3</sup> has given us the following valuable note on the development of the law as to competency. "Witnesses in court were always put under oath, and, accordingly, were always required to have that amount of maturity, sense and religious belief which the act of swearing presupposes. Other qualifications became necessary. Of the jury, who were witnesses, we are early told that they were challengeable for the same causes as witnesses in the ecclesiastical courts.<sup>4</sup> Bracton (fol. 85) enumerates a number of these causes, such as having been convicted of perjury, and being an enemy or intimate friend or a dependent of a party to the litigation; and he adds that there are others *de quibus ad praeesum non recolo*. It was natural, that, in general, women should be excluded from the jury. But as regards witnesses to the jury, the grounds of exclusion were much less rigid. The use of such witnesses came about very slowly. There was indeed, of old, a practice of sending out with the jury the attesting witnesses to deeds, where the execution was disputed; and a like practice in some other cases, e. g., that of persons present at the endowing of a woman at the church door. These were relics

<sup>2</sup> Articles: 8 Am. Law Reg. 1, 65, 193, 26 Am. Law Rev. 821, 9 Harvard Law Rev. 1.

<sup>3</sup> Thayer Cases Ev. (2d Ed.) pp. 1066, 1067.

<sup>4</sup> Citing Glanville ii. c. 12.

of a very ancient period. Such persons had to swear, but they need not, in general, have the qualifications required of the jury.”<sup>5</sup>

Coke qualifies the assertion of some of the older judges, that “they had not seen witnesses challenged.” He mentions as grounds of exclusion, legal infamy, being an “infidel,” of non-sane memory, “not of discretion,” a party interested, “or the like.” And he says that “it hath been resolved by the justices (in 1612) that a wife cannot be produced either against or for her husband, quia sunt duae animae in carne una.” He also states that “he that challengeth a right in the thing in demand.” cannot be a witness. “Here,” says Professor Thayer, “are the outlines of the subsequent tests for the competency of witnesses. They were much refined upon, particularly the excluding ground of interest; and great inconvenience resulted. At last, in the fourth and fifth decades of the present century, in England, nearly all objections to competency were abolished, or turned into matters of privilege. Similar changes, a little later, were widely made in this country. Today the only grounds of general incompetency in England appear to be those of natural inability, i. e., extreme youth, or mental incapacity or disorder. But in criminal cases the accused person and the wife or husband were, until lately, as a general rule, incompetent there.<sup>6</sup> This last incompetency is largely abolished in this country; the accused and the husband or wife have merely a privilege of silence. And so in England by the ‘Criminal Evidence Act, 1898,’ there is but little general incompetency of witnesses here, other than what rests on natural inability; but the statutes of our different jurisdictions vary.”

### § 715. Development of the law as to competency—Continued.

The old common law excluded from the witness stand parties to the record and those who were intersted in the result, both in civil and criminal cases, for fear of perjury. There were exceptions, but they were such only as sprang from the supposed necessities of the case. Even as late as 1842, as pointed out in a recent decision of the supreme court of the United States,<sup>7</sup> it was considered a doubtful question whether the owner of goods stolen on the high seas was a competent witness on the trial of the party accused of the larceny,

<sup>5</sup> Liber Assisarum, 34, 12 (1338).  
 Fortescue has the earliest account  
 (about 1470) of witnesses testifying  
 regularly to the jury. De Laud, c. 26.

<sup>6</sup> Stephen Dig. Ev. arts. 106, 108.

<sup>7</sup> Benson v. United States, 146 U.  
 S. 325, 13 Sup. Ct. 60, 63.

where the statute provided that a part of the fine should be paid to the owner.<sup>8</sup> "Nor were those named the only grounds of exclusion, from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction."<sup>9</sup>

§ 716. **Social or race disqualifications.**—Prior to the enactment and enforcement of the act of congress known as the "Civil Rights Bill" the law in most of the slave holding states was that persons having more than one-fourth, and in some states one-eighth, negro blood in their veins were incompetent to be witnesses in an action, civil or criminal, in which a white person was a party in interest.<sup>10</sup>

<sup>8</sup> But the witness was held competent. *United States v. Murphy*, 16 Pet. (U. S.) 203.

<sup>9</sup> *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60, 63.

<sup>10</sup> *Graham v. Crockett*, 18 Ind. 119; *Smyth v. Oliver*, 31 Ala. 39; *Heath v. State*, 34 Ala. 250; *Hughes v. Jackson*, 12 Md. 450; *Jordan v. Smith*, 14 Ohio, 199; *Dean v. Commonwealth*, 4 Gratt. (Va.) 541; *Dupree v. State*, 33 Ala. 380; *State v. Cooper*, 3 Harr. (Del.) 571; *Hawkins v. State*, 7 Mo. 190. See, also, *Nave v. Williams*, 22 Ind. 368; *Rusk v. Lowerwine*, 3 Har. & J. (Md.) 97, and compare *Grady v. State*, 11 Ga. 253. In North Carolina it was held that the provision rendering persons of color incompetent witnesses in certain cases was repugnant to the Constitution. In *State v. Under-*

*wood*, 63 N. Car. 98, the court said: "According to that instrument (the Constitution) persons of color are entitled to vote and to hold office. The greater includes the less, and the effect is to take away the mark of degradation imposed by the statute under consideration. We see every day persons of color holding seats in the Senate and in the House of Representatives, and filling places in the executive departments of the state; so it would be incongruous and absolutely absurd to rule that a free person of color is incompetent as a witness against a white man charged with the offense of marking one of his neighbor's sheep." Negro testimony is always received in the courts of our state in cases between negroes or against negroes. *Elliott v. Mor-*



But with the abolition of slavery all objections to the competency of negroes or slaves was removed, and they are not now excluded because of their race.<sup>11</sup> If an Indian can be made to understand and comprehend the obligation and meaning of an oath, he is a competent witness,<sup>12</sup> although in some jurisdictions Indians have been held incompetent.<sup>13</sup> What may be considered as the true rule in regard to Chinamen is that they are competent,<sup>14</sup> if they ade-

gan, 3 Hau. (Del.) 316. A, colored, was indicted for assault and battery with intent to murder B, white. Upon trial A offered C, colored, and the Supreme Court held him to be competent on the ground that the state was not a person of any particular color, so that rule as applied to suits in which white persons were parties could not apply. Woodward v. State, 6 Ind. 492. Contra: Jones v. State, 19 Tenn. 120; Gray v. State, 4 Ohio, 353. Even where a white person is a party a negro will be permitted to testify as to his (the negro's) original entries in an order book, so that the book may be introduced in evidence. Webb v. Pindergrass, 4 Harr. (Del.) 439. Where a criminal offense has been committed against a negro by a white person, the negro is a competent witness against the white person in a prosecution for that offense. State v. Rash, 1 Del. Cr. 271; State v. Whitaker, 3 Harr. (Del.) 549; State v. Griffin, 3 Harr. (Del.) 560. Contra: People v. Howard, 17 Cal. 63. Color alone does not render the witness incompetent. He must have negro blood in his veins. Thus a dark colored Turk was held competent. People v. Elyea, 14 Cal. 144.

<sup>11</sup> Ex parte Warren, 31 Tex. 143; Clarke v. State, 35 Ga. 75; Kelley v. State, 25 Ark. 392; State v. Underwood, 63 N. Car. 98.

<sup>12</sup> Priest v. State, 10 Neb. 393, 6 N. W. 468; Brugier v. United States, 1 Dak. Ter. 5, 46 N. W. 502.

<sup>13</sup> Even if the statute excludes them the objection must be made in the lower court, and it there made to appear that the party called as a witness is really an Indian. The fact that the party called is chief of an Indian tribe is not conclusive that he is an Indian. Harris v. Doe, 4 Blackf. (Ind.) 369. See People v. Howard, 17 Cal. 63. In Mississippi an Indian is competent to be a witness in a suit between white men. Doe v. Newman, 3 Smed. & M. (Miss.) 565; Coleman v. Doe, 4 Smed. & M. (Miss.) 40.

<sup>14</sup> In re Tung Yeong, 19 Fed. 184. In this case the court said: "By the constitution and laws of the United States, Chinese persons, in common with all others, have the right 'to the equal protection of the laws,' and this includes the right 'to give evidence' in courts. A Chinese person is therefore a competent witness. To reject his testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person would be an evasion, or rather violation, of the constitution and law which every one, who sets a just value upon the uprightness and independence of the judiciary, would deeply deplore. See, to the same effect: Territory

quately understand the obligation of an oath. Some of the California decisions, however, have held them incompetent.<sup>15</sup>

§ 717. **The modern view.**—Even at common law it was not presumed that disqualification because of interest, race, religious belief, or the like, existed, in the absence of anything to indicate incompetency, and a witness was ordinarily considered as *prima facie* competent. But, as already shown, the law today not only does not presume incompetency because of such supposed disqualifications, but it goes farther and no longer considers them to be disqualifications, in ordinary cases, so far as competency is concerned. Interest and the like may effect the credibility of a witness, but it does not render him incompetent. This change has been largely brought about by legislation, but the decisions of the courts have tended in the same direction. "The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers, which excluded witnesses from the stand, have been removed, till now it is generally, though, perhaps, not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence."<sup>16</sup> In order to prevent misunderstanding, however, it should be stated that a witness may be so mentally or, in some jurisdictions, so morally disqualified, as to be incompetent; and so, of course, a particular witness, such as one introduced as an expert, for instance, may not have the experience or knowledge necessary to render him competent to testify as to the particular matter in question.

§ 718. **Competency as to knowledge.**—The evidence of a witness should not be excluded because he had slight opportunity of acquiring information or because another had a better opportunity

*v. Yee Shun*, 3 N. Mex. 100; *Pullen v. Pullen* (N. J.) 3 Cent. R. 676; *The Bark Merrimac*, 1 Ben. (U. S.) 490." So, as elsewhere shown, such an oath may be administered as is binding upon the witness according to the custom and religion of his native country.

<sup>15</sup> *Speer v. See Yup Co.* 13 Cal. 73. A defendant Chinaman in a criminal

action may introduce Chinese witnesses in his behalf. *People v. Awa*, 27 Cal. 638. A Chinaman who has been robbed by a white person is not a competent witness to testify against the white person when indicted for the robbery. *People v. Jones*, 31 Cal. 565.

<sup>16</sup> *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60, 63, 64.

of knowing a fact than he.<sup>17</sup> Such matters affect the credibility and weight of the evidence rather than the competency of the witness. But there are cases, such, for instance, as that of a witness called to give expert testimony, in which the question of knowledge may become important upon the question of competency as well as credibility.

**§ 719. Imperfect recollection.**—A witness, it has been said, must be able to give at least the substance of what was said<sup>18</sup> or done when he undertakes to testify as to such a matter. But if a witness cannot remember precisely dates or names or places, his testimony may nevertheless be admissible and such defects go to his credibility<sup>19</sup> and not necessarily to his competency.

**§ 720. Raising the question of competency.**—The competency of witnesses is presumed,<sup>20</sup> and if a party desires to take advantage of the incompetency of a witness, he must object to the witness testifying.<sup>21</sup> A mere general objection that the witness is incompetent is not, ordinarily, sufficient,<sup>22</sup> the objector must state particularly and specifically the grounds of objection.<sup>23</sup> A party, after calling

<sup>17</sup> *Governor v. Roberts*, 2 Hawks (N. C.) 26; *Badger v. Story*, 16 N. H. 168; *Lewis v. Eagle Ins. Co.* 10 Gray, 508. See article 19 Am. Law Rev. 583.

<sup>18</sup> *Burson v. Huntington*, 21 Mich. 415.

<sup>19</sup> *Walker v. Blassingame*, 17 Ala. 810. See, also, *O'Connell v. Pennsylvania Co.* 118 Fed. 989.

<sup>20</sup> *Richardson v. Hoge*, 24 Ga. 203; *Anderson v. Irvine*, 5 B. Mon. (Ky.) 488; *Renwick v. Williams*, 2 Md. 356; *Norris v. Hurd*, Walk. (Mich.) 102; *Lott v. Sandifer*, 2 Mill (S. Car.) 167; *Adams v. Barrett*, 3 Ga. 277; *State v. Holloway*, 8 Blackf. (Ind.) 45; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; *Pegg v. Warford*, 7 Md. 582; *Hulshart v. Hart*, 1 N. J. L. 52.

<sup>21</sup> *White Water, &c. Co. v. Dow*, 1 Ind. 141; *Bunker v. Gilmore*, 40 Me. 88. See, also, *Emory v. Owings*,

3 Md. 178; *Grant v. Levan*, 4 Pa. St. 393; *Bates v. Barber*, 4 Cush. (Mass.) 107.

<sup>22</sup> *State v. Levy*, 5 La. Ann. 64; *Brown v. State*, 24 Ark. 620. See, upon the general subject that objections must be specific, *Bingham v. Walk*, 128 Ind. 164; *Fitzpatrick v. Papa*, 89 Ind. 17; *Russell v. Braham*, 8 Blackf. (Ind.) 277; *Fischer v. Neil*, 6 Fed. 89; *Carter v. Bennett*, 4 Fla. 283, 337; *Smith v. White*, 5 Dana, Ky. 376; *Portoues v. Holmes*, 33 Ill. App. 312; *State v. Watson*, 81 Iowa, 380; *Adams v. Irving Nat. Bank*, 110 N. Y. 606; *Cofer v. Scroggins* (Ala.) 13 So. 115; *Lowenstein v. McCadden*, (Tenn.) 22 S. W. 426; *Hutchinson v. Whitman* (Mich.) 55 N. W. 438.

<sup>23</sup> *Gittings v. Hall*, 1 Har. & J. (Md.) 14; *Leach v. Kelsey*, 7 Barb. (N. Y.) 466; *Peters v. Horbach*, 4 Pa. St. 134; *Holloway v. Galloway*,

a witness to testify in his favor, cannot object to the competency of the witness.<sup>24</sup> So, examining a witness-in-chief when he is hostile to the party making the examination, is generally deemed to be a waiver of all grounds of incompetency that may exist in the witness.<sup>25</sup>

§ 721. **Time of objecting to competency.**—The objection to the competency of a witness should, as a rule, be made before the examination-in-chief if the ground of objection is known at that time.<sup>26</sup> The party cannot wait and see whether the witness' testimony is favorable or unfavorable to him and then interpose his objections.<sup>27</sup> But it is not an invariable and inflexible rule that the objection must

51 Ill. 159; *Chapline v. Keedy*, 3 Har. & M. (Md.) 578; *Snyder v. May*, 19 Pa. St. 235; *Chunot v. Larson*, 43 Wis. 536; *People v. Nelson*, 85 Cal. 421; *Kansas City, &c. R. Co. v. Smith*, 90 Ala. 25; *Smith v. McCarthy*, 33 Ill. App. 176; *Litten v. Wright School Tp.* 127 Ind. 81; *Ohio, &c. R. Co. v. Walker*, 113 Ind. 196; *Babb v. Missouri Univ. Curators*, 40 Mo. App. 173; *Abbott v. Chaffee*, 83 Mich. 256; *Henry v. Dean*, 6 Dak. 78; *Smith v. Morrill*, 39 Kans. 665; *Tucker v. Jones*, 8 Mont. 225; *Helena v. Albertrose*, 8 Mont. 499; *Bulwinkle v. Cramer*, 30 S. Car. 153; *District of Columbia v. Woodbury*, 136 U. S. 450; *Prindle v. Campbell*, 7 Mackey (D. C.) 598; *Prather v. Rambo*, 1 Blackf. (Ind.) 189. The reasons for the rule are well stated in *Rush v. French*, 1 Ariz. 99, 112. To be of avail on appeal the grounds of the objections should, as a general rule, be brought into the record by bill of exceptions. *Camden v. Doremus*, 3 How. U. S. 515; *Delphi v. Lowery*, 74 Ind. 520; *United States v. Mc-Masters*, 4 Wall. (U. S.) 68; *Burton v. Driggs*, 20 Wall. 125; *Mayes v. Fritton*, 20 Wall. (U. S.) 414; Ro-

senthal v. Chisum, 1 N. Mex. 633.

<sup>24</sup> *Seip v. Storch*, 52 Pa. St. 210; *Varick v. Jackson*, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571; *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Mattice v. Allen*, 33 Barb. (N. Y.) 543; *Stockton v. Demuth*, 7 Watts (Pa.) 39, 32 Am. Dec. 735.

<sup>25</sup> *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Kelly v. Brooks*, 25 Ala. 523; *De Vendal v. Malone*, 25 Ala. 272. See, also, *Choteau v. Thompson*, 3 Ohio St. 424; *Beall v. Lynn*, 6 H. & J. (Md.) 336.

<sup>26</sup> *Patterson & Co. v. Wallace*, 44 Pa. St. 88; *Milsap v. Stone*, 2 Colo. 137; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Howser v. Com.* 51 Pa. St. 332; *Inglebright v. Hammond*, 19 Ohio, 337; *Lewis v. Morse*, 20 Conn. 211. See, also, *Trussell v. Scarlett*, 18 Fed. 214, and note; *Maurice v. Worden*, 54 Md. 233; *City of Ft. Wayne v. Combs*, 107 Ind. 75. But compare *Finch v. Chicago, &c. R. Co.* 46 Minn. 250, 48 N. W. 915.

<sup>27</sup> *Bogert v. Bogert*, 2 Edw. (N. Y.) 399; *Tappan v. Butler*, 7 Bosw. (N. Y.) 480; *Den v. Downam*, 1 Green (N. J.) 135; *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483.

be made before the examination-in-chief, for much depends upon the circumstances in each particular case, and if there is no waiver, either express or implied, the court may sustain such an objection after the examination has begun, or even after it is completed.<sup>28</sup> So, if the party who makes the objection did not know of the ground of incompetency before the examination-in-chief, he may, generally, object as soon as the ground of objection is discovered.<sup>29</sup> But if he delays after he discovers, or ought to have discovered, the objection, it will be deemed waived.<sup>30</sup>

**§ 722. Trying the question of competency.**—After an objection has been made to the competency of a witness, the court must decide the question of his competency. The witness can neither be admitted to testify, nor rejected, in ordinary cases, without a decision as to his competency.<sup>31</sup> A jury cannot decide the question of competency; it must be done by the court.<sup>32</sup> There are two

<sup>28</sup> *Hill v. Postley*, 90 Va. 200, 17 S. E. 946, 947; *Warwick v. Warwick*, 31 Gratt. (Va.) 70; 2 Elliott's Gen. Pr. § 589. It is a matter largely in the discretion of the court to permit questions to be interposed after the examination has begun, for the purpose of determining the competency of the witness, and this is frequently done. So, such questions are usually permitted to determine the competency of the evidence where the witness is himself competent.

<sup>29</sup> *State v. Damery*, 48 Me. 327; *Johnson v. Alexander*, 14 Tex. 382; *Veiths v. Hagge*, 8 Iowa, 163; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

<sup>30</sup> *Legg v. McNeill*, 2 Tex. 428; *Davis v. Roberts*, 5 Humph. (Tenn.) 111; *Levering v. Langley*, 8 Minn. 107; *Hudson v. Crow*, 26 Ala. 515; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Groshon v. Thomas*, 20 Md. 234; *Gregory v. Dodge*, 4 Paige (N. Y.) 557; *Drake v. Foster*, 28 Ala. 649; *Lewis v. Morse*, 20 Conn. 211;

*Stuart v. Lake*, 33 Me. 87; *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Rogers v. Dibble*, 3 Paige (N. Y.) 238.

<sup>31</sup> *State v. Secrest*, 80 N. Car. 450; *Walker v. Skeene*, 3 Head (Tenn.) 1.

<sup>32</sup> *Choteau v. Searcy*, 8 Mo. 733; *Amory v. Fellowes*, 5 Mass. 219; *Dole v. Thurlow*, 12 Met. (Mass.) 157; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *City Council v. Haywood*, 2 Nott & M. (S. Car.) 308; *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Cook v. Mix*, 11 Conn. 432; *Tucker v. Welsh*, 17 Mass. 160; *Perkins v. Stickney*, 132 Mass. 217; *Commonwealth Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Rohrer v. Morningstar*, 18 Ohio, 579; *State v. Michael* (W. Va.) 16 S. E. 803; *City of Ft. Wayne v. Combs*, 107 Ind. 75; *McEwen v. Bigelow*, 40 Mich. 215; *Dole v. Johnson*, 50 N. H. 452; *Wright v. Williams' Estate*, 47 Vt. 222; *Howard v. City of Providence*, 6 R. I. 514; *Flynt v. Bodenhamer*, 80 N. Car. 205; *Castner v. Sliker*, 33 N. J. L. 95.

methods of trying or determining the competency of a witness—one by an examination on the *voir dire* and the other by the introduction of extrinsic evidence, but the general rule is that both methods cannot be pursued at the same time.<sup>33</sup> The matter is largely within the discretion of the court, but, ordinarily, if a party objecting to a witness, attempts and fails to establish his incompetency by the examination on the *voir dire*, he cannot resort to other evidence to show the incompetency,<sup>34</sup> or if he fails by the introduction of other evidence, he cannot then, as a matter of right, examine on the *voir dire*.<sup>35</sup> So, where testimony is received from others as to the competency of witness, it has been held that the witness cannot then be examined on the *voir dire* to disprove such testimony.<sup>36</sup> A witness may be examined, in a proper case, on the *voir dire* respecting contracts, records or documents, which are not produced at the trial.<sup>37</sup> If evidence other than that given by the witness is introduced, it should be clear and satisfactory, for if there is doubt as to the competency of the witness he will generally be allowed to testify and the question of his credibility will go to the jury.<sup>38</sup> A witness cannot be excluded on evidence merely that he had made declarations to the effect that he was incompetent.<sup>39</sup> Where the incompetency of a

<sup>33</sup> *Mallet v. Mallet*, 1 Root (Conn.) 501; *Bridge v. Wellington*, 1 Mass. 219; *Butler v. Butler*, 3 Day (Conn.) 214; *Waughop v. Weeks*, 22 Ill. 350; *Walker v. Collier*, 37 Ill. 362; *Miffin v. Bingham*, 1 Dall. (U. S.) 272; *McAlister v. Williams*, 1 Overt. (Tenn.) 119; *Chance v. Hine*, 6 Conn. 231; *The Watchman*, 1 Ware (U. S.) 232; *Diversy v. Will*, 28 Ill. 216; *Welden v. Buck*, Anth. (N. Y.) 15.

<sup>34</sup> *Stuart v. Lake*, 33 Me. 87; *Schnader v. Schnader*, 26 Pa. St. 384; *Butler v. Butler*, 3 Day (Conn.) 214, 218; *Le Barron v. Redman*, 30 Me. 536; *Gordon v. Bowers*, 16 Pa. St. 226; *Dorr v. Osgood*, 2 Tyler (Vt.) 28. See, also, *Stebbins v. Sackett*, 5 Conn. 258, 261. The right to swear a witness on the *voir dire* belongs to the party objecting

to his competency. *Wright v. Matthews*, 2 Blackf. (Ind.) 187; *Foley v. Mason*, 6 Md. 37.

<sup>35</sup> *Miffin v. Bingham*, 1 Dall. (U. S.) 272; *Chance v. Hine*, 6 Conn. 231; *Bridge v. Wellington*, 1 Mass. 219; *Stebbins v. Sackett*, 5 Conn. 258.

<sup>36</sup> *Robinson v. Turner*, 3 Greene, (Iowa) 540; *Carroll v. Pathkiller*, 3 Port. (Ala.) 279; *Hiscox v. Hendree*, 27 Ala. 216.

<sup>37</sup> *Miller v. Mariner's Church*, 7 Me. 51; *Mayo v. Gray*, 2 Penn. (N. J.) 839; *Babcock v. Smith*, 31 Ill. 57; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Howser v. Commonwealth*, 51 Pa. St. 332.

<sup>38</sup> *Haynes v. Hunsicker*, 26 Pa. St. 58; *Johnson v. Kendall*, 20 N. H. 304; 1 Best Ev. §§ 133, 144.

<sup>39</sup> *Dunn v. Cronise*, 9 Ohio, 82;

witness is first discovered, after he has been sworn and has given part of his evidence, such evidence should be withdrawn and the jury should be instructed to disregard it.<sup>40</sup>

Davis v. Whiteside, 4 J. J. Marsh. (Ky.) 116; Pierce v. Chase, 8 Mass. 487; Vining v. Wooten, Cooke (Tenn.) 127; Ingram v. Watkins, 1 Dev. & B. (N. Car.) 442; Young v. Garland, 18 Me. 409; Freeman v. Lockett, 2 J. J. Marsh. (Ky.) 390; Stuart v. Lake, 33 Me. 87; Com. v. Waite, 5 Mass. 261; Nichols v. Holgate, 2 Ark. (Vt.) 138; Rich v. Eldredge, 42 N. H. 153. Contra: Bean

v. Jenkins, 1 Har. & J. (Md.) 135; Colston v. Nichols, 1 Har. & J. (Md.) 105. Declarations made by the party calling the witness are admissible. Peirce v. Chase, 8 Mass. 487; Walker v. Coursin, 19 Pa. St. 321.

<sup>40</sup> Jacobs v. Laybom, 11 M. & W. 685; Brockbank v. Anderson, 7 M. & G. 295; Stout v. Wood, 1 Blackf. (Ind.) 71; Fisher v. Willard, 13 Mass. 379.

## CHAPTER XXXIII.

### PARTIES INTERESTED IN THE EVENT OF THE SUIT.

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| 724. The rule.   | 737. Persons having transactions with decedents.                                     |
| 725. Interest of doubtful nature.  | 738. Transactions with decedents—Discretion of court—Right to examine adverse party. |
| 726. Interest of great or less degree.   | 739. Other classes of persons held incompetent.                                      |
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| 734. Husband and wife—Collateral proceedings—Wife agent of husband and vice versa. | 747. Assignment of interest.   |
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§ 723. **Meaning of term.**—By a party interested in the event of the suit is meant one who has an interest in or a relation to the matter in controversy, or to the issue of the suit, in the nature of



a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind, inclining the person to favor one side or the other.<sup>1</sup> This was deemed, at common law, sufficient to disqualify, and the common law doctrine will be considered in this chapter, although the doctrine no longer obtains, except in a few jurisdictions and in a very limited class of cases in other jurisdictions.

§ 724. **The rule.**—The common law rule is that no person interested in the event of a cause shall be competent to testify in that cause.<sup>2</sup> The interest that will disqualify, however, is required to be a legal, certain and direct interest either in the judgment that is to be rendered, or in the record which would be evidence for or against him in a subsequent suit.<sup>3</sup> A mere interest

<sup>1</sup> Black Law Dict.

<sup>2</sup> III. Blackstone Comm. § 369; Bean v. Pearsall, 12 Ala. 592; Alexander v. Trask, 20 Ala. 805; Bryan v. Smith, 22 Ala. 534; Evans v. Hettich, 7 Wheat. (U. S.) 453; Netherton v. Robertson, 3 Hayw. (Tenn.) 29; Bliss v. Thompson, 4 Mass. 488; Page v. Weeks, 13 Mass. 199; Fairchild v. Beach, 1 Day (Conn.) 266; Cotchet v. Dixon, 4 McCord (S. Car.) 311; McGee v. Eastis, 5 Stew. & P. (Ala.) 426; Woodard v. Spiller, 1 Dana (Ky.) 179; Fowler v. Collins, 2 Root (Conn.) 231; Nass v. Vanswearingen, 7 S. & R. (Pa.) 192; Hoyt v. Wildfire, 3 Johns. (N. Y.) 518; Reece v. Johnson, 1 Hempst. (U. S.) 82; Kennon v. McRea, 2 Port. (Ala.) 389; Evans v. Eaton, 7 Wheat. (U. S.) 356; Henarie v. Maxwell, 10 N. J. L. 297, (353); Gould v. James, 6 Cow. (N. Y.) 369; Jones v. Post, 4 Cal. 14; Stebbins v. Sackett, 5 Conn. 258; McCall v. Smith, 2 McCord (S. Car.) 375; Kennedy v. Bossiere, 16 La. Ann. 445; Word v. Braynard, 9 Pick. (Mass.) 322; Lloyd v. Good-

win, 20 Miss. 223; Spears v. Burton, 31 Miss. 547; State v. Pray, 14 N. H. 464; Woolcott v. Clifford, 16 N. H. 457. In a prosecution for malicious injury to animals, if part of the fine will go to the party injured he is an interested party and can only be examined with the consent of the accused. Northcut v. State, 43 Ala. 330. If the effect of a witness's testimony will be to create or increase a fund in which he may be entitled to participate, he is incompetent. Governor v. Justices, 20 Ga. 359; Rome v. Dickerson, 13 Ga. 302; Cleverly v. McCullough, 2 Hill (S. Car.) 445; Brown v. O'Brien, 1 Rich. (S. Car.) 268; Johnson v. Alexander, 14 Tex. 382. It is not error to allow an interested witness to testify with the consent of parties. Allen v. Brown, 5 Mo. 323. Where a person is summoned as the garnishee of another, and in his answer denies that he owes him anything, the latter is not a competent witness to prove his indebtedness to himself. Standefer v. Welby, 26 Miss. 145.

<sup>3</sup> Ely v. Forward, 7 Mass. 25;

in the question involved does not render the witness incompetent.<sup>4</sup> Neither does an interest arising from some social, official, or friendly

Worcester v. Eaton, 11 Mass. 368; Cornogg v. Abraham, 1 Yeates (Pa.) 84; Poe v. Dorrah, 20 Ala. 288; Howard v. Brown, 3 Ga. 523; Jordan v. Pollock, 14 Ga. 145; Smith v. White, 3 Dana (Ky.) 376; City Council, &c. v. Weikman, 1 Rich. (S. Car.) 240; Marwick v. Georgia Co. 18 Me. 49; Dunbar v. Chevalier, 28 Miss. 161; Pickett v. Cloud, 1 Bailey (S. Car.) 362; Hill v. Miller, 2 Swan (Tenn.) 659; Osborn v. Cummings, 4 Tex. 10; Bigham v. Carr, 21 Tex. 142; Baird v. Wolfe, 4 McLean (U. S.) 549; Morrow v. Campbell, 7 Port. (Ala.) 41; Emer-ton v. Andrews, 4 Mass. 653; Scott v. Jester, 13 Ark. 437; Landsberger v. Gorham, 5 Cal. 450; Molyneux v. Collier, 30 Ga. 731; Robbins v. Butler, 24 Ill. 387; Wickliffe v. Mosely, 4 J. J. Marsh. (Ky.) 172; Gilkinson v. The Scotland, 14 La. Ann. 417; Atkinson v. Snow, 30 Me. 364. The true test of the interest of a witness is, whether he will gain or lose by the direct legal operation and effect of the judgment in the cause; or whether the record will be legal evidence for or against him in some other action. Eaton v. Gentle, 1 Chand. (Wis.) 10. "A witness is interested in the event of a suit, if the record can be used as an instrument of evidence in securing to him some advantage, or of repealing some charge against him or claim upon him in some future proceeding." Linsee v. State, 5 Blackf. (Ind.) 601. The mere expectation of deriving an advantage to which he is not legally entitled will not disqualify a witness. Coghill v. Bor-

ing, 15 Cal. 213. A witness who, in the event of a judgment being rendered against the defendant, would be liable to her for nearly the amount of the judgment is incompetent as a witness for the defendant on the ground of interest. Mason v. Jones, 36 Ill. 212. A witness may be admitted to testify upon a point in a case in which he is not interested, though he may be interested upon some other point. Shelton v. Tomlinson, 2 Root (Conn.) 132. This is especially true in a court of chancery. Bank v. Merserau, 3 Barb. (N. Y.) 528. A party against whom the record in a case cannot be used in a subsequent action is a competent witness therein. Coltart v. Laughinghouse, 35 Ala. 190; Richardson v. Carey, 2 Rand. (Va.) 87.

<sup>4</sup> Handley v. Call, 27 Me. 35; Baker v. Corey, 19 Pick. (Mass.) 496; Todd v. Boone County, 8 Mo. 431; Wright v. Lewis, 18 Ala. 194; Bass v. Peevey, 22 Tex. 295; Williams v. Jones, 2 Ala. 314; Masters v. Varner, 5 Gratt. (Va.) 168; Rollins v. Taber, 25 Me. 144; McLaren v. Hopkins, 1 Paige (N. Y.) 18; Estice v. Cockerell, 26 Miss. 127; Stoddard v. Mix, 14 Conn. 12; Cook v. Brown, 34 N. H. 460; Mull v. Martin, 85 N. Car. 406; McMurray's Appeal, 101 Pa. St. 421; Jennings v. Crider, 2 Bush (Ky.) 322; Mathews v. Felch, 25 Vt. 536. "It is perfectly clear that a person having an interest only in the question, and not in the event of the suit, is a competent witness; and, in general, the liability of a wit-

relation.<sup>5</sup> Some of the courts hold that where the witness would testify under an impression that he was interested, even though such impression was absolutely without foundation, the effect on his mind would be the same as if actually interested, and he cannot testify;<sup>6</sup> but this is denied by other courts.<sup>7</sup>

The rule is stated, in a comparatively recent case,<sup>8</sup> as follows: "Under the common law the interest, in order to exclude a witness, must be some legal, certain and immediate interest, however minute in the result of the cause, or in the record as an instrument of evidence. Where actual gain or loss would result, simply and immediately from the verdict and judgment, the witness was deemed incompetent by reason of his interest, as where he was a party, though but a nominal party to the suit; or was a party in beneficial interest; or quasi a party, from having entered into a rule of court or agreement that another cause to which he was a party should abide the same result with that in

ness to a like action, or his standing in the same predicament with the party sued, if the verdict can not be given in evidence for or against him, is an interest in the question and does not exclude him." *Evans v. Eaton*, 7 Wheat. (U. S.) 356, 423. In a suit against a defendant for trover based on fraud, other parties who have been defrauded and have similar suits are competent witnesses. *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. R. 607. A mere naked agreement between counsel to let the event of one suit abide the fate of another does not render the plaintiff in the former incompetent to testify in the latter. *Clapp v. Mandeville*, 5 How. (Miss.) 197.

<sup>5</sup> 1 Greenleaf Ev. § 386.

<sup>6</sup> *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Sentney v. Overton*, 4 Bibb (Ky.) 445; *Winn v. Cole*, 1 Miss. 119; *Richardson v. Hunt*, 2 Munf. (Va.) 148; *Plumb v. Whiting*, 4 Mass. 518; *Peter v. Beall*,

4 Har. & M. (Md.) 342; *McVeagh v. Goods*, 1 Dall. 62; *Johnson v. Kendall*, 20 N. H. 304. Contra: *Long v. Bailie*, 4 S. & R. (Pa.) 222; *Hairs v. Barkley*, Harp. (S. Car.) 63; *State v. Clark*, 2 Tyler, (Vt.) 278.

<sup>7</sup> *Gayle v. Bishop*, 14 Ala. 552; *McCabe v. Hand*, 18 Cal. 496; *Stallings v. Carson*, 24 Ga. 423; *Washington, &c. Road v. State*, 19 Md. 239; *State v. Poteet*, 7 Ired. (N. Car.) 356; *Cassiday v. McKenzie*, 4 W. & S. (Pa.) 282; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466. The declarations of a witness, made to others, that he is interested in the event of a suit do not necessarily prove him to be so, or that he is an incompetent witness. *George v. Stubbs*, 26 Me. 243; *Cole v. Cole*, 33 Me. 542; *Nichols v. Hogate*, 2 Aik. (Vt.) 138.

<sup>8</sup> *Adams v. Board of Trustees, &c.* 37 Fla. 266, 20 So. 266.

which he proposed to give evidence. A witness was also incompetent by the common law where the record would, if his party succeeded, be evidence of some matters of fact to entitle him to a legal advantage or repel a legal liability." It must be a present, certain, and vested interest, and not an interest uncertain, remote or contingent.

§ 725. **Interest of doubtful nature.** If the interest is of a doubtful nature or contingent, it goes to the credit of the witness and not to his competency;<sup>9</sup> the interest must be a real interest, and not one merely apprehended by the party.<sup>10</sup> Formerly the witness' own declaration of his interest excluded him,<sup>11</sup> but, according to later authorities, his declaration is not conclusive, but evidence aliunde should be introduced.<sup>12</sup>

§ 726. **Interest of great or less degree.**—The magnitude or degree of the interest is not considered in determining the competency of the witness.<sup>13</sup> The fact that the witness believes himself to be

<sup>9</sup> *Gordon v. Bowers*, 16 Pa. St. 226; *Stewart v. Kip*, 5 Johns. (N. Y.) 256; *Stockham v. Jones*, 10 Johns. (N. Y.) 21; *Burroughs v. United States*, 2 Paine (U. S.) 569; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Frankfort Bank v. Johnson*, 24 Me. 490; *Scull v. Mason*, 43 Pa. St. 99; *Wentworth v. Crawford*, 11 Tex. 127; *Andre v. Bodman*, 13 Md. 241; *Cutter v. Fanning*, 2 Iowa, 580; *Easley v. Easley*, 18 B. Mon. (Ky.) 86; *Day v. Green*, Hard. (Ky.) 117; *Cincinnati, &c. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Snow v. Thomas-ton, Bank*, 19 Me. 269; *Cole v. Cole*, 33 Me. 542; *Wilson v. Hillyer*, 1 N. J. Eq. 63; *McCaskey v. Graff*, 23 Pa. St. 321.

<sup>10</sup> *Melvin v. Melvin*, 6 Md. 541; *Luke v. Leland*, 6 Cush. (Mass.) 259; *Gott v. Williams*, 29 Mo. 461; *Seaver v. Bradley*, 6 Me. 60; *Bean v. Smith*, 20 N. H. 461; *City Council, &c. v. Weikman*, 1 Rich. (S.

Car.) 240. If a witness is liable to a third person, who is liable to the party calling him, this does not render him incompetent; such circuitry of interest is not sufficient to disqualify him. *Mathews v. Poythress*, 4 Ga. 287; *Carbon v. Stout*, 2 Bush (Ky.) 246; *Com. v. Allen*, 30 Pa. St. 49.

<sup>11</sup> *Fotheringham v. Greenwood*, 1 Stra. 129; *Plumb v. Whiting*, 4 Mass. 518; *Freeman v. Luckett*, 2 J. J. Marsh. (Ky.) 390.

<sup>12</sup> *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94, 102; *Smith v. Downs*, 6 Conn. 365, 371; *George v. Stubbs*, 26 Me. 243. No confession of interest made by a witness, after a party is entitled to his testimony, can render him incompetent. *Sims v. Givan*, 2 Blackf. (Ind.) 461.

<sup>13</sup> *Scott v. McLellan*, 2 Me. 199; *Hunter v. Gatewood*, 5 T. B. Mon. (Ky.) 268; *Richardson v. Bartley*, 2 B. Mon. (Ky.) 328. So it has been

under honorary obligation to the party calling him, affects his credibility, not his competency.<sup>14</sup>

§ 727. **Interest balanced.**—Where the interest of the witness is exactly balanced, so that he will neither gain nor lose by the operation or use of the judgment rendered, he will be allowed to testify.<sup>15</sup> So, where the liability of the witness is already fixed, but to whom he is liable is to be determined, he should, generally, be allowed to testify.<sup>16</sup>

§ 728. **Interest against party calling witness—Extreme necessity.**—If the interest of the witness preponderates against the party

held that where the witness would be liable for the costs of the suit, however small, this interest renders him incompetent. *Craven v. Updyke*, 3 Blackf. (Ind.) 272; *Bulhitt v. Stewart*, 16 La. Ann. 22; *Cherry v. McCorkle*, 8 Iowa, 522; *Bill v. Porter*, 9 Conn. 23; *Wilkes v. McClung*, 29 Ga. 371; *Bennett v. Dowling*, 22 Tex. 660; *Cason v. Robson*, 29 Miss. 97; *Lowrey v. Summers*, 12 N. J. L. (240), 276.

<sup>14</sup> *Smith v. Downs*, 6 Conn. 365; *Bank v. Knapp*, 3 Pick. (Mass.) 96, 108; *Coleman v. Wise*, 2 Johns. (N. Y.) 165; *Com. v. Gore*, 3 Dana. (Ky.) 475; *Orput v. Miller*, 5 Blackf. (Ind.) 571; *Ludlow v. Union Ins. Co.* 2 S. & R. (Pa.) 119; *Frink v. McClung*, 9 Ill. 569; *Gilpen v. Vincent*, 9 Johns. (N. Y.) 219; *Cannan v. Foster*, 1 Ashm. (Pa.) 133. A witness stated that he "felt" some interest in the result of a suit, but the grounds of that feeling, as disclosed by him on his voir dire, showed that his interest was not of the disqualifying kind. *Held*, that he was competent. *Elliott v. Porter*, 5 Dana. (Ky.) 299. A declaration by a witness that he would pay a sum depending in a suit rather than that the party should lose it will not render him incom-

petent. *Neville v. Demeritt*, 2 N. J. Eq. 321.

<sup>15</sup> *Bridges v. Bell*, 13 Mo. 69; *Olston v. Huggins*, 2 Treadw. Const. (S. Car.) 688; *Starkweather v. Mathews*, 2 Hill (N. Y.) 131; *Abbott v. Cobb*, 17 Vt. 593; *Lewis v. Hodgdon*, 17 Me. 267; *Norton v. Waite*, 20 Me. 175; *Garner v. Bridges*, 38 Ala. 276; *Elgin v. Hill*, 27 Cal. 372; *Muchmore v. Jeffers*, 25 Ill. 180, (199); *Rhodes v. Myers*, 16 La. Ann. 398; *Thomasson v. Kennedy*, 3 Rich. Eq. (S. Car.) 440; *Montague v. Mitchell*, 28 Ill. 481; *Kennedy v. Evans*, 31 Ill. 258; *The Plymouth*, 1 Newb. Adm'r (U. S.) 56; *Cadwell v. Meek*, 17 Ill. 220; *Adams v. Gardiner*, 13 B. Mon. (Ky.) 197; *Governor v. Gee*, 19 Ala. 199; *Scott v. The Plymouth*, 6 McLean (U. S.) 463; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *Ford v. McKibbin*, 1 Strobb. (S. Car.) 33; *Dearing v. Windham*, 11 Ala. 204; *Douglass v. Holbert*, 7 J. J. Marsh. (Ky.) 1; *Smalley v. Ellet*, 136 Ill. 500. A preponderance of interest on one side makes the witness incompetent on that side. *Dille v. Woods*, 14 Ohio, 122; *Gill v. Campbell*, 24 Tex. 405.

<sup>16</sup> *Locket v. Child*, 11 Ala. 640;

calling him, he will be allowed to testify.<sup>17</sup> So, the evidence of an interested party may be received in cases of extreme necessity, where no other evidence is reasonably to be expected.<sup>18</sup>

§ 729. **Rule where interest is voluntarily created.**—A person is ordinarily a competent witness where he is called to testify against his interest.<sup>19</sup> He cannot voluntarily create an interest so as to deprive the party calling him of the benefit of his testimony,<sup>20</sup> but if the interest is created by operation of law, the ordinary rules as to competency will govern.<sup>21</sup>

Cushman v. Loker, 2 Mass. 106, 108; Wright v. Nichols, 1 Bibb (Ky.) 298; Eldridge v. Wadleigh, 12 Me. 371; Miller v. Little, 1 Yeates (Pa.) 26; Andre v. Bodman, 13 Md. 241; Spence v. Mitchell, 9 Ala. 744; Emerson v. Providence Hat Mfg. Co. 12 Mass. 237; Lightner v. Martin, 2 McCord (S. Car.) 214; Stewart v. Stocker, 1 Watts (Pa.) 135.

<sup>17</sup> Le Clair v. Peterson, 4 Blackf. (Ind.) 273; Nooe v. Highdon, 4 Blackf. (Ind.) 184; Turner v. Davis, 1 B. Mon. (Ky.) 151; Haile v. Hill, 13 Mo. 612; Englehard v. Slater, 8 Miss. 538; Darling v. March, 22 Me. 184; Loftin v. Nally, 24 Tex. 565; Doe v. Jackson, 9 Miss. 494; Stokes v. Kane, 5 Ill. 167; Brown v. O'Brien, 1 Rich. (S. Car.) 268. To exclude him on the ground of interest he must appear to be interested in favor of the party who calls him. Sims v. Givan, 2 Blackf. (Ind.) 461; Lansingburg v. Willard 8 Johns. (N. Y.) 428; Jackson v. Vredenbergh, 1 Johns. (N. Y.) 159; Kennedy v. Barnett, 1 Bibb (Ky.) 154. Where a witness is interested for both parties, but on one side indirectly and contingently, and on the other side directly and absolutely, he is incompetent for the party in whose behalf he is di-

rectly interested. Pool v. Myers, 21 Miss. 466.

<sup>18</sup> Lampley v. Scott, 24 Miss. 528.

<sup>19</sup> Cowles v. Whitman, 10 Conn. 121; Tuttle v. Turner, 28 Tex. 759; Sims v. Randal, 1 Brev. (S. Car.) 85; Brooks v. McKinney, 5 Ill. 309; Brown v. Burke, 22 Ga. 574; Commercial Bank v. Wood, 7 W. & S. (Pa.) 89; Merchand v. Cook, 4 Greene (Iowa) 115. It has been held that although a co-plaintiff may testify voluntarily against his own interest, an infant party will not be permitted to do so, even with the consent of a next friend, by whom he sues. Rickards v. Laus, 3 Harr. (Del.) 393.

<sup>20</sup> Overman v. Coble, 13 Ired. (N. Car.) 1; Elliott v. Lewallen, 1 Ind. 534; Price v. Wood, 7 T. B. Mon. (Ky.) 223; Hafner v. Irwin, 4 Ired. (N. Car.) 529; Way v. Arnold, 18 Ga. 181; Heskett v. Borden, &c. Co. 10 Md. 179. It has been adjudged that an interest in the event of a suit acquired after the commencement of it, does not render the witness incompetent, unless it was acquired from the party offering him. Rhem v. Jackson, 2 Dev. (N. Car.) 187.

<sup>21</sup> Jones v. Hoskins, 18 Ala. 489.

§ 730. **Parties to the record—Common law rule.**—The interest of parties to the record in the issue of the litigation made them incompetent as witnesses at common law.<sup>22</sup> There were, however, some exceptions to the rule, as, for instance, in cases where there would be an absolute failure of justice because there was no other evidence to be had.<sup>23</sup> So, at common law a defendant in a criminal case was incompetent to testify in his own favor.<sup>24</sup>

§ 731. **Parties to the record—Effect of modern statutes.**—Statutes in most jurisdictions have abolished this disqualification and parties to the record in civil cases may testify as any other witnesses except, generally, in those cases in which transactions with insane, incompetent or deceased persons are involved. In a few jurisdictions, however, no exceptions are made. So statutes in most jurisdictions have abolished the disqualification as to a defendant in a criminal case, and the accused in such prosecutions is made a competent witness in his own behalf, if he desires to become such.

§ 732. **Husband and wife—Rule at common law.**—Where the husband or wife of the witness called is interested in the event of the suit, the other is incompetent under the common law rule.<sup>25</sup> This rule, at least so far as it excludes the testimony of one spouse for the other, was founded on their identity of interest, and the like-

<sup>22</sup> Fox v. Whitney, 16 Mass. 118; Little v. Arrowsmith, 16 N. J. L. 221; Bridges v. Armour, 5 How. (U. S.) 91; Terry v. Dayton, 31 Barb. (N. Y.) 519.

<sup>23</sup> United States v. Clark, 96 U. S. 37, 41.

<sup>24</sup> Hoagland v. State, 17 Ind. 488; Harwell v. State, 10 Lea (Tenn.) 544.

<sup>25</sup> Labaree v. Wood, 54 Vt. 452; Bank, &c. v. Mandeville, 1 Cranch (C. C.) 575; Bierly's Estate, 81½ Pa. St. 419; Perrin v. Johnson, 16 Ind. 72; Keaton v. McGwier, 24 Ga. 217; Hollowell v. Simonson, 21 Ind. 398; Karney v. Paisley, 13 Iowa, 89; Hopkins v. Smith, 7 J. J. Marsh. (Ky.) 263; Bird v. Davis, 14 N. J. Eq. 467; Pryor v. Ryburn, 16 Ark.

671; Vandiver v. Glaspy, 7 Rich. (S. Car.) 14; Cull v. Herwig, 18 La. Ann. 315; Wilson v. Sheppard, 28 Ala. 623; Marshman v. Conklin, 17 N. J. Eq. 282; Griffin v. Brown, 2 Pick. (Mass.) 304; Young v. Gilman, 46 N. H. 484; Rice v. Keith, 63 N. Car. 319; Cobb v. Edmondson, 30 Ga. 30; Dexter v. Parkins, 22 Ill. 143; McKeen v. Frost, 46 Me. 239; Kelly v. Drew, 12 Allen (Mass.) 107; Payne v. Devinal, 11 Smed. & M. (Miss.), 400; Leggett v. Boyd, 3 Wend. (N. Y.) 376; Donnelly v. Smith, 7 R. I. 12; Jones v. Norton, 10 Tex. 120; Gilkey v. Peeler, 22 Tex. 663; Johnston v. Slater, 11 Gratt. (Va.) 321; Meek v. Pierce, 19 Wis. 300; Hussey v. State, 87 Ala. 121; Harrington v. City of Se-

lihood that such evidence would be untrustworthy, their interests being deemed practically inseparable from the unity created by the marriage relation.<sup>26</sup> The rule also prevailed in equity,<sup>27</sup> and even death or judicial annulment of the marriage does not operate to

dalia, 98 Mo. 583; Holtzmar v. Wagner, 5 Mackey (D. C.) 15; Simpson v. Botherton, 62 Tex. 170; Norfolk, &c. R. Co. v. Prindle, 82 Va. 122; Jenkins v. Levis, 25 Kans. 479; Reynolds v. Schaffer, 91 Mich. 494; Johnson v. Boice, 40 La. Ann. 273; Storrs v. Storrs, 23 Fla. 274; Shaw v. Schoonover, 130 Ill. 448; Nicholas v. Austin, 82 Va. 817; Jones v. Degge, 84 Va. 685; Bell v. Thoop, 140 Pa. St. 641; Evans v. Evans (Pa. St.) 26 Atl. 755. Where a failing debtor fails to schedule property which is in his wife's name, and his creditors compel him by law to do so, he is a competent witness in regard to good faith of his schedule, and his wife is competent in favor of her separate interest. Cosgrove v. Creditors, 41 La. Ann. 274. Where several parties are jointly indicted the wife of one of the co-defendants is competent against any of the others but not against him. State v. Wright, 41 La. Ann. 600. A wife is an incompetent witness in any civil proceeding to which her husband is a party. Weikel v. Probasco, 7 Ind. 690; Tacket v. May, 3 Dana (Ky.) 79; Kelley v. Proctor, 41 N. H. 139; Manchester v. Manchester, 24 Vt. 649. For the rule under the Nebraska statute see Niland v. Kalish (Neb.) 55 N. W. 295. Where the witness' wife was a stockholder in a bank bringing the suit this evidence was rejected. Routh v. Agricultural Bank, 12 Smed. & M.

(Miss.) 161. The wife can be a witness to testify as to the contents of a lost trunk of her husband. Illinois, &c. R. Co. v. Taylor, 24 Ill. 323; Illinois, &c. R. Co. v. Copeland, 24 Ill. 332; Sasseen v. Clark, 27 Ga. 242; McGill v. Rowand, 3 Pa. St. 451. The mother of a child begotten before marriage, but born after, is incompetent to prove that the child was not begotten by the man who became her husband. Denison v. Page, 29 Pa. St. 420.

<sup>26</sup> Kemp v. Downham, 5 Harr. (Del.) 417; Waddams v. Humphrey, 23 Ill. 661; Bradford v. Williams, 2 Md. Ch. 1; Kimbrough v. Mitchell, 1 Head (Tenn.), 539; Peaslee v. McLoon, 82 Mass. 488; Gee v. Scott, 48 Tex. 510. In Turner v. State, 60 Miss. 351, the court said: "The reasons why husband and wife were incompetent for or against each other at common law were, First, the unity of person and interest subsisting between them; and, secondly, the regard which the law had for the harmony of the marital relation, to preserve which neither spouse was permitted to testify against the other." The marriage relation contracted and existing between slaves was sufficient to bring the testimony within the rule forbidding husband and wife to testify for or against each other. Hampton v. State, 45 Ala. 82.

<sup>27</sup> Vowles v. Young, 13 Ves. 140, 144.



relax the rule,<sup>28</sup> at least as to testifying as to privileged matters. Neither, it has been held, is competent to prove the fact of access or non-access during the marriage relation.<sup>29</sup> The incompetency of one to testify against the other, while often treated in the same way as the incompetency of one to testify for the other, is based on the policy or sentiment that to permit such testimony would disturb the harmony of the marriage relation, rather than upon the idea of interest in the event of the suit, and there are exceptions that do not exist when one is testifying for the other. So death may end the prohibition, and there are probably cases in which the other spouse might waive it. Both of these cases should be distinguished from mere privileged communications. As to the latter it usually makes no difference whether the husband or wife is a party or not, and the privilege may be waived, but death or divorce does not destroy the privilege.

**§ 733. Husband and wife—Rule under modern statutes.**—Husband and wife are now, in many states, by statute made competent as witnesses for each other in civil actions, except as to confidential communications,<sup>30</sup> and where both are parties, or both have

<sup>28</sup> *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Aveson v. Lord Kinnauld*, 6 East, 188, 192; *Cook v. Grange*, 18 Ohio, 526; *Perry v. Randall*, 83 Ind. 143; *Rea v. Tucker*, 51 Ill. 110; *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242; *Peterson v. Peterson*, 13 Phila. (Pa.) 82; *Storms v. Storms*, 3 Bush (Ky.) 77; *Crook v. Henry*, 25 Wis. 569; *Barnes v. Camack*, 1 Barb. (N. Y.) 392; *Johnson v. State*, 27 Tex. App. 135; *Rea v. Tucker*, 51 Ill. 110; *Patton v. Wilson*, 2 Lea (Tenn.) 101. The rule which in civil matters disqualifies the husband for or against the wife, and vice versa, founded on considerations of policy and morality, is without exception. Nor does their voluntary separation touch the reason of the rule, which remains inflexible. *Tulley v. Alexander*, 11 La. Ann. 628. The divorced wife

may testify as to matters which have occurred since the granting of the divorce. *Long v. State*, 86 Ala. 36.

<sup>29</sup> *Boykin v. Boykin*, 70 N. Car. 262. See post Chapter on Privileges of Witnesses.

<sup>30</sup> *Anchampaugh v. Schmidt*, 77 Iowa, 13, 41 N. W. 472; *Phares v. Barbour*, 49 Ill. 370; *Louisville, &c. Co. v. Thompson*, 107 Ind. 442, 9 N. E. 357; *Harriman v. Sampson*, 23 Ill. App. 159; *Porter v. Allen*, 54 Ga. 623; *Wing v. Goodman*, 75 Ill. 159; *Hawver v. Hawver*, 78 Ill. 412; *McNail v. Zeigler*, 68 Ill. 224; *Northern, &c. Co. v. Shearer*, 61 Ill. 263; *Snow v. Carpenter*, 49 Vt. 426; *Noy v. Creed*, 1 Ill. App. 557; *Pickens v. Knisely*, 29 W. Va. 1; *Merriam v. Hartford, &c. Co.* 20 Conn. 354. The common law rule is that one cannot be a witness

substantial interests, both are competent witnesses.<sup>31</sup> The statutes of many of the states completely change the common law rule, and husband and wife are competent, under most of the statutes, to testify in all cases for each other, and, under some statutes, against each other, except where their testimony goes to matters of a confidential nature. The statutes vary considerably in their terms and effect, but the Massachusetts statute may be considered as a type of some of them, and the Indiana statute may be considered as a type of some others. Under the former, husband and wife are competent to testify in all cases except as to privileged communications; but one cannot be compelled to testify in a criminal proceeding against the other, though it is held that the witness may do so if willing.<sup>32</sup> In Indiana it is the general rule that all parties to an action and their respective husbands or wives are competent, but there are some exceptions, as in most states, and one cannot testify to confidential communications unless the other waives the objection,

for or against the other except in suits between them or where one is indicted for an offense against the other. In other cases they are allowed to testify only where they are made competent by statutory enactments. *Lucas v. Brooks*, 18 Wall. (U. S.) 436. In an action for damages to realty held by them as tenants by entirety, both have such an interest therein as to be competent witnesses. *Edmondson v. City of Moberly*, 98 Mo. 523. In Kentucky, in certain cases, either, but not both, can testify. One testifying precludes the other. *Wise v. Foote*, 81 Ky. 10. The husband is a competent witness in an action by husband and wife for assault and battery on the wife. *Sinkins v. Eddie*, 56 Vt. 612. Or in an action by husband and wife for personal injuries sustained by the wife because of defendant's negligence. *Kaime v. Omro Trustees*, 49 Wis. 371; *Packet Co. v. Clough*, 20 Wall. (U. S.) 528. As to Wisconsin stat-

ute, see, also, *In re Jones*, 6 Biss. (U. S.) 68.

<sup>31</sup> *O'Bryan v. Allen*, 95 Mo. 68; *Cameron v. Fay*, 55 Tex. 58; *Sanders v. Reister*, 1 Dak. Ter. 151; *Westerman v. Westerman*, 25 Ohio St. 500; *Harriman v. Stowe*, 57 Mo. 93; *Matteson v. New York, &c. Co.* 62 Barb. (N. Y.) 364; *Ruth v. Ford*, 9 Kans. 17; *Buck v. Ashbrook*, 51 Mo. 539; *Haworth v. Norris*, 28 Fla. 763; *McKee v. Spiro*, 107 Mo. 452; *Rock Island v. Deis*, 38 Ill. App. 409. Where they are parties to a suit, in company with others, they are, in general, only competent to testify to such controversies involved in the suit, as in which they alone are materially interested. *Zane v. Fink*, 18 W. Va. 693. The husband cannot testify for his wife, where she is a party, and the opposite party is the representative of a deceased person. *Hunter v. Lowell*, 64 Me. 572.

<sup>32</sup> *Commonwealth v. Barker* (Mass.) 70 N. E. 203.

and so, if one is a party and incompetent, in his or her own behalf, the other is also excluded. But the husband is competent in a suit for seduction of the wife and she is not.<sup>33</sup>

§ 734. **Husband and wife—Collateral proceedings—Wife agent of husband and vice versa.**—In collateral proceedings, where their interests are only contingently and not immediately affected, they are usually competent.<sup>34</sup> Thus, where the wife acts as the duly authorized agent of the husband she is a competent witness in any suit concerning the subject matter of the agency.<sup>35</sup> So where the hus-

<sup>33</sup> See *Lyman v. Buckner*, 60 Ind. 402; *Sloan v. Sloan*, 21 Ind. App. 315, 52 N. E. 413; *Niehaus v. Cooper*, 22 Ind. App. 610, 52 N. E. 761; *Adams v. Maine*, 3 Ind. App. 232, 29 N. E. 792; *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8; *Jordan v. State*, 142 Ind. 422, 41 N. E. 817. But much is left to the discretion of the court in cases in which the witness is usually incompetent under the statute. See, also, as to other jurisdictions in which both husband and wife are incompetent if one is. *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082; *Buckingham v. Roar*, 45 Neb. 244, 63 N. W. 398; *Larabie v. Wood*, 54 Vt. 452.

<sup>34</sup> *Commonwealth v. Reid*, 8 Phila. (Pa.) 385; *Clubb v. State*, 14 Tex. App. 192.

<sup>35</sup> *Sauter v. Scrutchfield*, 28 Mo. App. 150; *Taylor v. Duesterberg*, 209 Ind. 165, 9 N. E. 907; *Wheeler, &c. Mfg. Co. v. Tinsley*, 75 Mo. 458; *Schmied v. Frank*, 86 Md. 250; *Mitchell v. Hughes*, 24 Ill. App. 308; *Degenhast v. Schmidt*, 7 Mo. App. 117; *Fisher v. Conway*, 21 Kans. 18; *Bach v. Parmely*, 35 Wis. 238; *Magness v. Walker*, 26 Ark. 470; *Sumner v. Corke*, 51 Ala. 521; *Sargeant v. Marshall*, 38 Ill. App. 642; *Lunay*

*v. Vantyne*, 40 Vt. 501; *Town v. Lempshire*, 37 Vt. 52; *Chunot v. Larson*, 43 Wis. 536; *Burke v. Savage*, 13 Allen (Mass.) 408; *Hardy v. Matthews*, 42 Mo. 406; *Birdsall v. Dunn*, 16 Wis. 235; *Packard v. Reynolds*, 100 Mass. 153; *Bruce v. Mathews*, 101 Mass. 64; *Morony v. O'Laughlin*, 102 Mass. 184; *Poppers v. Miller*, 14 Ill. App. 87; *Engmann v. Immel's Estate*, 59 Wis. 249; *Teckenbrock v. McLaughlin*, 25 Mo. App. 524. In Arkansas they have been held not competent for or against each other, even where one acts as the agent of the other. *Watkins v. Turner*, 34 Ark. 663. See, also, *Magness v. Walker*, 26 Ark. 470. In Illinois the wife is regarded as a feme sole when her competency to testify, in regard to matters in which she acted as agent for her husband, is questioned and she is admitted. *Poppers v. Miller*, 14 Ill. App. 87. Conversations between husband and wife concerning matters in regard to an agency conferred on her are not confidential communications. *Schmied v. Frank*, 86 Ind. 250. Husband and wife are competent for or against each other under a Wisconsin statute only in the following cases: 1. Where both are parties to the action; 2. Where one is charged with

band acts as the agent of the wife, he is competent as regards matters growing out of the agency.<sup>36</sup>

§ 735. **Husband and wife—Rendered competent by release or death.**—A husband or wife may be rendered competent by a complete release of interest in certain cases.<sup>37</sup> So, after the death of husband or wife the survivor may be a competent witness in a suit in which the other would have been interested as to all facts except those which were acquired through the confidential communications made during the marriage relation.<sup>38</sup> Their confidential communi-

personal violence upon the other;  
3. Where one has acted as the agent of the other, as to matters within the scope of such employment. *Carney v. Gleissner*, 58 Wis. 674.

The fact that the wife was present while her husband conducted transactions with a third person does not make her the agent of the husband within the rule allowing the wife to testify in regard to matters or transactions conducted by her as his agent. *Trepp v. Barker*, 78 Ill. 146. Where the wife is merely left at home, while her husband is absent, without any special charge or directions, she is not his agent as to matters transpiring during his absence. *Bates v. Cilley*, 47 Vt. 1. Where a wife was directed by her husband to call into their home the indorser of a note held by the husband, and she "asked him whether he was going to pay the note," she is not the husband's agent to such an extent as to render her competent to prove admissions made to her by the indorser. *Hale v. Danforth*, 40 Wis. 382.

<sup>36</sup> *Chesley v. Chesley*, 54 Mo. 347; *Hobby v. Wisconsin Bank*, 17 Wis. 167; *Robison v. Robison*, 44 Ala. 227; *Menk v. Steinfort*, 39 Wis. 370; *Arndt v. Harshaw*, 53 Wis. 269; *Quade v. Fisher*, 63 Mo. 325; *Haerle*

*v. Kreihn*, 65 Mo. 202; *Council Grove, &c. R. Co. v. Center*, 42 Kans. 438; *Rape v. Hess*, 118 N. Y. 668, 23 N. E. 128.

<sup>37</sup> *Owen v. Cawley*, 36 Barb. (N. Y.) 52; *Meredith v. Hughes*, 28 Ga. 571; *Borneman v. Sidinger*, 21 Me. 185; *Hadley v. Chapin*, 11 Paige (N. Y.) 245; *Weems v. Weems*, 19 Md. 334; *Peaceable v. Keep*, 1 Yeates (Pa.) 576. The wife of the payee of a note, who has indorsed it to a third party, and is released from liability thereon, is a competent witness for the holder. *Bisbing v. Graham*, 14 Pa. St. 14.

<sup>38</sup> *Haugh v. Blythe*, 20 Ind. 24; *English v. Cropper*, 8 Bush (Ky.) 292; *Woolley v. Turner*, 13 Ind. 253; *Wellis v. Britton*, 1 Har. & J. (Md.) 478; *Tatum v. Manning*, 9 Ala. 144; *Lingo v. State*, 29 Ga. 470; *Jack v. Russey*, 8 Md. 180; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Jackson v. Barron*, 37 N. H. 494; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Keator v. Dimmick*, 46 Barb. (N. Y.) 158; *Gaskill v. King*, 12 Ired. (N. Car.) 211; *Ame's Succession*, 33 La. Ann. 1317; *Stein v. Bowman*, 13 Pet. (U. S.) 209. If one of two defendants in a suit against them as makers of a note dies pending the suit, his widow

cations cannot, at least in civil cases, be given in evidence at any time,<sup>39</sup> unless there is a waiver or consent by the proper person. And where the witness is called to testify in regard to the property of the deceased husband or wife in which he or she is interested, it has been held that the evidence will not be received.<sup>40</sup> It would seem that death might or might not render the survivor competent to testify *for* the estate or interests of the deceased, according to the particular case, and that death or divorce would more clearly render one spouse competent to testify against the interests of the other, in most cases at least, because the ground of exclusion in such cases, namely, the policy of preserving the marital peace and harmony, no longer exists after the termination of that relation;<sup>41</sup> but the authorities are not clear and entirely harmonious upon the subject.

**§ 736. Husband and wife—One a defendant in a criminal prosecution.**—When the husband or wife was the defendant in a criminal prosecution the other was, at common law, incompetent either for or against the one accused.<sup>42</sup> The marriage relation, however,

becomes a competent witness for the plaintiff. *Saunders v. Hendrix*, 5 Ala. 224. A husband is not a competent witness to prove the consideration for a post-nuptial settlement upon the wife, in favor of those claiming under her, though after her death. *William and Mary College v. Powell*, 12 Gratt. (Va.) 372. In an action at law between the administrators of two estates concerning the title to slaves, a woman who was the widow of both of the decedents is an incompetent witness for the administrator of the estate which has the smaller number of distributees. *Lay v. Lawson*, 23 Ala. 377.

<sup>39</sup> *Raynes v. Bennett*, 114 Mass. 424; *Griffin v. Smith*, 45 Ind. 366; *Stanley v. Montgomery*, 102 Ind. 102.

<sup>40</sup> *Ame's Succession*, 33 La. Ann. 1317; *Chaney v. Moore*, 1 Coldw. (Tenn.) 48; *Wade v. Johnson*, 5

*Humph. (Tenn.)* 117; *Peacock v. Albin*, 39 Ind. 25; *Spradling v. Conway*, 51 Mo. 51; *Winship v. Enfield*, 42 N. H. 197.

<sup>41</sup> See *Griffin v. Smith*, 45 Ind. 366; *French v. Ware*, 65 Vt. 338, 344, 26 Atl. 1096; *Inman v. State*, 65 Ark. 508, 47 S. W. 558; *Mercer v. Patterson*, 41 Ind. 440. But compare *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *State v. Raby*, 121 N. Car. 682, 28 S. E. 490. We are not, of course, referring to confidential communications, for, as we have already said, neither death nor divorce takes away the privilege in such cases.

<sup>42</sup> *Colton v. State*, 62 Ala. 12; *Byrd v. State*, 57 Miss. 243; *Schultz v. State*, 32 Ohio St. 276; *Overton v. State*, 43 Tex. 616; *William v. State*, 33 Ga. Supp. 85; *Steen v. State*, 20 Ohio St. 333; *Wilke v. People*, 53 N. Y. 525; *Lucas v. State*, 23 Conn. 18; *State v. Burlingham*,

must be a lawful one or the rule generally has no application.<sup>43</sup> And if the offense was committed by husband or wife against the other, the injured party is usually a competent witness, either for or against the accused,<sup>44</sup> both at common law and under the statutes.

15 Me. 104; *State v. Welch*, 26 Me. 30; *State v. Wilson*, 31 N. J. L. 77; *People v. Carpenter*, 9 Barb. (N. Y.) 580; *State v. Bradley*, 9 Rich. (S. Car.) 168; *State v. McGrew*, 13 Rich. (S. Car.) 316; *United States v. Addatte*, 6 Blatchf. (U. S.) 76; *Merriwether v. State*, 81 Ala. 74; *United States v. Crow Dog*, 3 Dak. 106; *United States v. Jones*, 32 Fed. 569; *Puspin v. State*, 55 Md. 462. But it has frequently been held that where there is a joint indictment and separate trials the husband or wife of the defendant not on trial, may, if willing, testify against the party on trial. *State v. Drawdy*, 14 Rich. (S. Car.) 87; *Commonwealth v. Reid*, 8 Phila. (Pa.) 385; *United States v. Addatte*, 6 Blatchf. (U. S.) 76; *Williams v. State*, 69 Ga. 11; *Contra: State v. Bradley*, 9 Rich. (S. Car.) 168; *State v. Burlingham*, 15 Me. 104. See, also, *State v. West*, 118 Wis. 469, 95 N. W. 521; *Campbell v. State*, 133 Ala. 158, 32 So. 635. If the husband is under suspicion but not yet indicted, and the defendant seeks to show that the husband is the guilty party, the wife may give exculpatory testimony for him. *Fimcher v. State*, 58 Ala. 215. Where the trial as well as the indictment is joint the wife of one defendant is not a competent witness for the other defendants. *State v. Workman*, 15 S. Car. 540; *Commonwealth v. Easland*, 1 Mass. 15; *Mark v. State*, 32 Miss. 205; *Morrissey v. People*, 11

Mich. 327; *Carr v. State*, 42 Ark. 204. In an indictment for battery the wife of an accessory is a competent witness for the principal. *State v. Mooney*, 64 N. Car. 54. She is competent for or against the others where a nol. pros. has been entered against her husband. *Woods v. State*, 76 Ala. 35. The wife of an accomplice may testify against the principal if the accomplice is not affected by her testimony. *Askea v. State*, 75 Ga. 356. Where the husband or wife elects to testify in behalf of the other the state has a right to cross-examine them. *Creamer v. State*, 34 Tex. 173.

<sup>43</sup> *Mann v. State*, 44 Tex. 642; *Rickerstricker v. State*, 31 Ark. 207; *State v. Brown*, 28 La. Ann. 279; *Sims v. State*, 30 Tex. App. 605. The rule does not extend to the case of a mistress. *Dennick v. Crittenden*, 42 N. Y. 542; *Flanagin v. State*, 25 Ark. 92.

<sup>44</sup> In *Turner v. State*, 60 Miss. 351, 45 Am. R. 412, the court, in speaking of a case where the husband had assaulted the wife, said: "The husband, therefore, who assaults his wife commits an injury, not only upon her, but upon society, of which they are members. It is for the injury to the public, committed upon it through the person of the wife, that he is punished. It is for the protection of society, and of the wife as a member of society, that she is made competent as a witness against the husband for in-

**§ 737. Persons having transactions with decedents.**—Persons who have had transactions with deceased persons are incompetent, as a general rule, to testify in regard to such transactions<sup>45</sup> when they are

juries committed by him on her. It is the offense against the public for which he is tried. He is an offender of the public and not the wife alone, and she is competent to testify as a witness for the public, and not as a witness for herself." See, also, *State v. Parker*, 42 La. 972, 8 So. 473; *State v. Neill*, 6 Ala. 685; *Commonwealth v. Murphy*, 4 Allen (Mass.) 491; *People v. Northrup*, 50 Barb. (N. Y.) 147; *State v. Davis*, 3 Brev. (S. Car.) 3; *Hanson v. State*, 63 Md. 123; *Tucker v. State*, 71 Ala. 342; *Bramlette v. State*, 21 Tex. App. 611; *People v. Marble*, 38 Mich. 117; *Whipp v. State*, 34 Ohio St. 87; *State v. Brown*, 67 N. Car. 470; *Johnson v. State*, 94 Ala. 53, 10 So. 427; *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. 405; *State v. Hurd*, 101 Iowa, 391, 70 N. W. 613; *Clarke v. State*, 117 Ala. 1, 23 So. 671; *Rex v. Doherty*, 13 East, 171; *Doolittle v. State*, 93 Ind. 292; *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772. But a subsequent marriage by a married man is not a crime against the lawful wife, and she is not a competent witness to prove the guilt of her husband. *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 154; *State v. Armstrong*, 4 Minn. 251; *Compton v. State*, 13 Tex. App. 271, 274; *Overton v. State*, 43 Tex. 616. Contra: *State v. Sloan*, 55 Iowa, 217; *Lord v. State*, 17 Neb. 526; *Roland v. State*, 9 Tex. App. 277. See, also, *Polson v. State*, 137 Ind. 519, 35 N. E. 907. A wife is a competent wit-

ness against her husband and another who are indicted for using an instrument on her with intent to procure a miscarriage. *State v. Dyer*, 59 Me. 303. See *State v. Briggs*, 9 R. I. 361. In North Carolina the husband or wife is competent against the other in a criminal prosecution of one for assault and battery on the other only when lasting injury is involved or threatened. *State v. Davidson*, 77 N. Car. 522. See, also, *State v. Hussey*, Busb. (N. Car.) 123. An indecent assault by a father on his nine-year-old daughter has also been held not such a "personal" wrong or injury to the mother as to allow her to testify against him in a criminal prosecution therefor. *People v. Westbrook*, 94 Mich. 629, 54 N. W. 486. See, also, *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 349; *State v. Evans*, 138 Mo. 116, 39 S. W. 462; *Boyd v. State*, 33 Tex. Cr. App. 470, 26 S. W. 1080.

"The reason for this rule is, it is said, "that the surviving party to the transaction in issue shall not have the unfair advantage of giving his version of the matter when the other and adverse party to the transaction is prevented by death from being heard to contradict or explain it." *Card v. Card*, 39 N. Y. 317, 323; *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190. In support of the proposition of the text see *Potts v. Mayer*, 86 N. Y. 302; *Holcomb v. Holcomb*, 95 N. Y. 316; *Alabama, &c. Co. v. Sledge*, 62 Ala. 566; *O'Neal v. Reynolds*, 42 Ala.

made subject matter of suit. This rule has also been applied to

197; *Miller v. Jones*, 32 Ark. 337; *Gist v. Gans*, 30 Ark. 285; *Satterlee v. Bliss*, 36 Cal. 489; *Blood v. Fairbanks*, 50 Cal. 420; *Perry v. Hodnett*, 38 Ga. 103; *Smith v. Johnson*, 45 Iowa, 308; *Peck v. McKean*, 45 Iowa, 18; *Wilson v. Wilson*, 52 Iowa, 44; *McKean v. Massey*, 9 Kans. 600; *Jaquith v. Davidson*, 21 Kans. 341; *Hobbs v. Russell*, 79 Ky. 61; *Chambers v. Hill*, 34 Mich. 523; *Schvaty v. Schvaty*, 35 Mich. 485; *Downey v. Andrus*, 43 Mich. 65; *Griswold v. Edson* (Minn.) 21 N. W. 475; *Looker v. Davis*, 47 Mo. 140; *Wamsley v. Crook*, 3 Neb. 344; *Ballou v. Tilton*, 52 N. H. 605; *Perkins v. Perkins*, 58 N. H. 405; *Halsted v. Tyng*, 2 Stew. (N. J. Eq.) 86; *Smith v. Cross*, 90 N. Y. 549; *Boykin v. Watts*, 6 Rich. (S. Car.) 76; *Davis v. Plymouth*, 45 Vt. 492; *Barnhill v. Kirk*, 44 Tex. 590; *Standbridge v. Catanach*, 183 Pa. St. 368; *Lewis v. Fort*, 75 N. Car. 251; *Ballard v. Ballard*, 75 N. Car. 190; *Woodhouse v. Simmons*, 73 N. Car. 30; *Le Clare v. Stewart*, 8 Hun, 127; *Angell v. Hester*, 64 Mo. 142; *Rushing v. Rushing*, 52 Miss. 329; *Jacks v. Bridewell*, 51 Miss. 887; *Stone v. Cook*, 79 Ill. 424; *Connelly v. Dunn*, 73 Ill. 218; *King v. Worthington*, 73 Ill. 161; *Langley v. Dodsworth*, 81 Ill. 86; *Whitmer v. Rucker*, 71 Ill. 410; *Ruckman v. Alwood*, 71 Ill. 155; *Wagner v. Robinson*, 56 Ga. 47; *Noble v. Withers*, 36 Md. 193; *Bishop v. Welch*, 35 Ind. 521; *Veal v. Veal*, 45 Ga. 511; *Latimer v. Sayre*, 45 Ga. 468; *Sherlock v. Alling*, 44 Ind. 184; *Jenks v. Opp*, 43 Md. 108; *Merrill v. Atkin*, 59 Ill. 19; *Dixon v. Edwards*, 48 Ga. 142; *State v. Osborne*, 67 N. Car. 259; *Isler v. Dewey*, 67 N. Car. 93; *Lyon v. Snyder*, 61 Barb. (N. Y.) 172; *Mattoon v. Young*, 45 N. Y. 696; *Anderson v. Hance*, 49 Mo. 159; *Waldman v. Crommelin*, 46 Ala. 580; *Field v. Brown*, 24 Gratt. (Va.) 74; *Fosgate v. Thompson*, 54 N. H. 455; *Huggins v. Huggins*, 71 Ga. 66; *Clark v. Clough*, 65 N. H. 43; *King v. Humphreys*, 138 Pa. St. 310; *Whitney v. Traynor*, 74 Wis. 289; *Tinstman v. Cranshore*, 104 Pa. St. 192; *Hall v. Otis*, 77 Me. 122; *Cochran v. Langmaid*, 60 N. H. 571; *Pember v. Congdon*, 55 Vt. 58; *Alcorn v. Cook*, 101 Pa. St. 209; *Murray v. New York, &c. R. Co.* 103 Pa. St. 37; *Lockhart v. Bell*, 90 N. Car. 499; *Junkins v. Lovelace*, 72 Ala. 303; *Heard v. Busby*, 61 Tex. 13; *Mayes v. Turley*, 60 Iowa, 407; *Ivers v. Ivers*, 61 Iowa, 721; *Harrell v. Houston*, 66 Tex. 278; *Seligman v. Ten Eyck's Estate*, 160 Mich. 267; *Mills v. Davis*, 113 N. Y. 243; *Rainwater v. Harris*, 51 Ark. 401; *Robinson v. James*, 29 W. Va. 224; *Henegan v. United States*, 17 Ct. of Cl. 155; *Adams v. Morrison*, 113 N. Y. 152; *McCall v. Wilson*, 101 N. Car. 598; *Wade v. Pulsifer*, 54 Vt. 45; *Smith v. Burnet*, 34 N. J. Eq. 219; *Jackson v. Clopton*, 66 Ala. 29; *Hall v. Hamblett*, 51 Vt. 589; *Owens v. Owens*, 14 W. Va. 88; *Pyle v. Oustatt*, 92 Ill. 209; *Corderey v. Hughes*, 6 Ill. App. 401; *Gray v. Whitney*, 81½ Pa. St. 332; *Shober v. Jack*, 3 Mont. 351; *Mason v. McCormick*, 80 N. Car. 244; *Tunno, &c. Co. v. Robert*, 16 Fla. 738; *Sabre v. Smith*, 62 N.



transactions had with persons who are insane and consequently unable

H. 663; *Berry v. McArdle*, 62 N. H. 354; *Nesbitt v. Parrott*, 84 Ga. 142; *Glover v. Thomas*, 75 Tex. 506; *Adams v. Edwards*, 115 Pa. St. 211; *James v. James*, 81 Tex. 373; *Gray v. Shelby*, 83 Tex. 405. Where the court is given discretion to permit a party to testify in his own behalf, where his adversary is an administrator or executor, the court should allow the testimony to be given only where it is such that the deceased, if alive, could testify to it. *Hoit v. Russell*, 56 N. H. 559. See *Ballou v. Tilton*, 52 N. H. 605. The witness may testify as to a conversation which he overheard, but in which he did not participate. *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465. Compare *Head v. Teeter*, 10 Hun (N. Y.) 548; *Deubo v. Wright*, 53 Ind. 226. Where a daughter was so provided for in her father's will as to have no interest in a suit brought by a third person upon a note executed by the father in his lifetime, she, as well as her husband, is a competent witness in such suit. *Kent v. Mason*, 79 Ill. 540. In a suit by infants, by guardian or next friend, against an administrator to recover rents collected from lands which had descended to them, such administrator is not a competent witness against the infants. *Wilson v. Unsell*, 12 Bush (Ky.) 215. A next friend being liable for costs is incompetent to testify as to any transaction or conversation with a deceased person. *Mason v. McCormick*, 75 N. Car. 263. Where the administrator of an indorsee of a note sues the indorser the indorser will not be allowed to testi-

fy that he never received notice of protest. *Lewis v. Weisenham*, 1 Mo. App. 222. The fact that the witness was at one time the holder of an equitable interest in the property in controversy does not render him incompetent. *Zerbe v. Reigart*, 42 Iowa, 229. The incompetency extends only to transactions with the deceased. As to other matters the witness is competent. *Sheibley v. Hill*, 57 Ga. 232. The rule applies to transactions with the deceased, and not to controversies arising with administrators. *Witherspoon v. Blewett*, 47 Miss. 570. The stockholders of a corporation suing an executor of a decedent for a subscription for stock made by such decedent, are competent witnesses. *Downes v. Maryland, &c. R. Co.* 37 Md. 100. Where a party sues for property which he purchased from a person who is now deceased, but which property is now claimed by a third person, who claims to have also purchased it from the deceased, in such an action the plaintiff is a competent witness in his own behalf. *Downs v. Belden*, 46 Vt. 674. Compare *Pattison v. Armstrong*, 74 Pa. St. 476. Where the witness proposes to testify to having received through the mails a certain letter purporting to have been written by the decedent, the testimony will be received, because the decedent, if living, would be unable to directly contradict such testimony. *Daniels v. Foster*, 26 Wis. 686. An attorney who was counsel for a prisoner on a former trial is not incompetent to testify as to what a certain witness swore to on that trial, even

to give testimony at time of trial.<sup>46</sup> So far as the idea of interest rendering the witness untrustworthy is involved, this is one of the few instances in which the principles of the common law are retained under most of the modern statutes, but these statutes vary considerably in their terms and effect, and the rule of exclusion in such cases, in any particular jurisdiction, depends upon the local statute and the construction given to it by the courts of such jurisdiction.<sup>47</sup> Under some of the statutes, as in Indiana for instance, it may be said that, generally speaking, three things are necessary in order to exclude the testimony of a surviving adverse party: (1.) The transaction or subject matter thereof must in some way be directly involved in the proceeding, and it must appear that one of the parties to such transaction is dead; (2.) The right of the deceased party must have passed to another who represents him as executor, administrator or the like; (3.) It must appear that the allowance to be made, or the judgment, may either directly or indirectly affect the estate of the deceased.<sup>48</sup> Where the transactions were had with a duly authorized agent of the deceased, and such agent's testimony has been received, the opposite party is competent.<sup>49</sup> In actions

though such witness has died since the trial. *State v. Cook*, 23 La. Ann. 347. The rule does not apply to transactions with third persons to which the deceased was no party, nor to transactions occurring since the deceased's death. *Martin v. Jones*, 59 Mo. 181. The witness must be interested in the result. *Hoskinson v. Miller*, 104 Pa. St. 175. After the death of one of two parties jointly bound by a contract, in a suit by the other and the adverse party, the latter is a competent witness. *Nugent v. Curran*, 77 Mo. 323.

<sup>46</sup> In *Pavey v. Wintrode*, 87 Ind. 379, which was a suit by a guardian of an insane person against several for fraud practiced on the ward, it was held that the defendants were not competent witnesses for each other, for "neither could testify for the other without testifying for himself."

<sup>47</sup> See remarks of Corliss, J., on the construction of such statutes, in *St. John v. Lofland*, 5 N. Dak. 140, 64 N. W. 930.

<sup>48</sup> *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190. See, also, *Lake Erie, &c. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923, 928. For other decisions under the Indiana statute, see *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142; *Owings v. Jones*, 151 Ind. 30, 51 N. E. 82; *Thornburg v. Allman*, 8 Ind. App. 531, 35 N. E. 1110; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316 (deceased represented by a party not in capacity of executor or administrator, yet rule applied); *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

<sup>49</sup> *McNab v. Stewart*, 12 Minn. 407; *Wade v. Hardy*, 75 Mo. 394; *McGlothlin v. Hemry*, 59 Mo. 213; *Har-*

brought by or against a surviving partner, it has been held in some jurisdictions that either party may testify as to transactions with the deceased partner.<sup>50</sup> If the representatives of the deceased person have introduced witnesses in their behalf, the opposite party then has the right to introduce testimony, or at least to cross-examine, upon the same subject matter as that testified to by the witnesses, even if it involves statements made by or transactions had with the decedent.<sup>51</sup> So if the deposition or testimony of the deceased person was taken

*riman v. Jones*, 58 N. H. 328; *Pratt v. Elkins*, 80 N. Y. 198; *Kerr v. McGuire*, 28 N. Y. 446; *Howerton v. Lattimer*, 68 N. Car. 370; *Cochran v. Almack*, 39 Ohio St. 314; *Cottrell v. Woodson*, 11 Heisk. (Tenn.) 681; *Hildebrant v. Crawford*, 65 N. Y. 107; *Standford v. Horwitz*, 49 Md. 525; *Ward v. Ward*, 37 Mich. 253; *Langford v. Com'rs*, 75 Ga. 502; *Davis v. Davis*, 93 Ala. 173; *Baer v. Pfaff*, 44 Mo. App. 35; *Copeland v. Koontz*, 125 Ind. 126, 25 N. E. 174 (but his testimony is limited to the transaction or conversation testified to by the agent. See *Robertson v. Reed*, 38 Mo. App. 32; *Aultman, &c. Co. v. Adams*, 35 Mo. App. 503; *Warten v. Strane*, 82 Ala. 311; *Williams v. Edwards*, 94 Mo. 447. If the agent with whom the transaction was had is dead it has been held that the testimony of the opposite party will not be received. *Morgan v. Bunting*, 86 N. Car. 66. Contra: *Voss v. King*, 33 W. Va. 236; *Roberts v. Richmond, &c. Co.* 109 N. Car. 670; *Hankey v. Downey*, 10 Ind. App. 500, 38 N. E. 220. Where an agent, with whom transactions were had is dead, the person dealing with the agent has been held an incompetent witness to prove what the agent said when the matter of the transactions becomes the subject of a suit. *Cornell v. Barnes*, 26 Wis. 473. Com-

pare: *Poquet v. North Hero*, 44 Vt. 91, and authorities above cited.

<sup>50</sup> *Flournoy v. Wooten*, 71 Ga. 168; *Combs v. Black*, 62 Miss. 831; *Bradley v. Patton*, 51 Ala. 108; *Faler v. Jordan*, 44 Miss. 283; *Roberts v. Yarboro*, 41 Tex. 449; *Runkel v. Phillips*, 9 Phila. (Pa.) 619; *Bennett v. Frary*, 55 Tex. 145; *Kale v. Elliott*, 18 Hun (N. Y.) 198; *Fulkerson v. Thornton*, 68 Mo. 468; *Hastings v. Gloster*, 13 Nev. 279; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156. Contra: *Baxter v. Leith*, 28 Ohio St. 84; *Hook v. Bixby*, 13 Kans. 164; *Meyer v. Morris*, 78 Md. 558; *Brady v. Reed*, 87 Pa. St. 111; *Foster v. Hart*, 29 Ill. App. 260; *Savard v. Herbert*, 1 Colo. App. 445; *Alexander v. Alford*, 89 Ky. 105; *Cooper v. Wood*, 1 Colo. App. 101. In a suit brought against a surviving partner on a partnership note executed by a deceased partner, the plaintiff is incompetent to testify in his own behalf, unless the defendant testifies in his own behalf, in which event he becomes competent. *Wiley v. Morse*, 30 Mo. App. 266.

<sup>51</sup> *Jacquin v. Davidson*, 49 Ill. 82; *Stewart v. Kirk*, 69 Ill. 509; *Strauber v. Mohler*, 80 Ill. 21; *Penn v. Oglesby*, 89 Ill. 110; *Johnson v. Heald*, 33 Md. 352; *Smith's Appeal* (Mich.) 18 N. W. 195; *Murphy v. Ray*, 73 N. Car. 588; *Rankin v. Hannan*, 38 Ohio St. 438; *Metz v.*

before his death in regard to such transactions and is used in the trial, or is in court so that it can be used, then the opposite party becomes competent<sup>52</sup> as to the matters embraced therein. So, evidence of a third person will be admitted in regard to entries in an account book, such entries being known to have been made by the deceased person.<sup>53</sup> Where the witness is called by the party against whom his interest predominates, or his testimony was against his interest, or where he is cross-examined by the party opposed to him in regard to matters occurring between him and the decedent, he then generally becomes competent and may testify as to such matters occurring between him and the decedent.<sup>54</sup> If other parties are joined with the administrator or executor and the adverse party is

Snodgrass, 9 W. Va. 190; Redman v. Redman, 70 N. Car. 257; Sweet v. Low, 28 Hun (N. Y.) 432; Martin v. Martin, 118 Ind. 227; McCartin v. McCartin, 45 N. J. Eq. 265. See, also, Gilbert v. Swain's Estate, 9 Ind. App. 88, 36 N. E. 374; Ferguson v. State, 90 Ind. 38.

<sup>52</sup> Mumm v. Owens, 2 Dill. (U. S.) 475; Allen v. Morgan, 61 Ga. 107; Monroe v. Napier, 52 Ga. 385; Anthony v. Stinson, 4 Kans. 211; Armitage v. Snowden, 41 Md. 119; Trow v. Shannon, 78 N. Y. 446; Potts v. Mayer, 86 N. Y. 302; Robbins v. Pultzs, 48 N. Y. S. 510; Lawson v. Jones, 61 How. Pr. (N. Y.) 424; Bradley v. Mirick, 25 Hun (N. Y.) 272; Bingham v. Lavender, 2 Lea (Tenn.) 48; Runnels v. Belden, 51 Tex. 48; Eaves v. Harbin, 12 Bush (Ky.) 445; McDonald v. Woodbury, 65 How. Pr. (N. Y.) 226; Nixon v. McKinney, 105 N. Car. 23; Hurley v. Lockett, 72 Tex. 262; Levy v. Dwight, 12 Colo. 101; Coble v. McClintock, 10 Ind. App. 562, 38 N. E. 74. Where the deposition of a deceased person, represented by his executor, has been read in evidence, the other party may testify on all material points

and matters of fact embraced in the deposition. Hatton v. Jones, 78 Ind. 466. Where the facts to which the party seeks to testify consist of documents or public records which were equally within the knowledge of the decedent or his representatives, the party will be allowed to testify. Ripley v. Seligman, 88 Mich. 177.

<sup>53</sup> Carroll v. Davis, 9 Abb. N. Cas. (N. Y.) 60; Marsh v. Brown, 18 Hun (N. Y.) 319. See Silver v. Worcester, 72 Me. 322.

<sup>54</sup> Shell v. Boyd, 32 S. Car. 359; Mason v. Prendergast, 120 N. Y. 536; Davis v. Gallagher, 55 Hun (N. Y.) 593; Moore v. Trimmier, 32 S. Car. 511; Chase v. Evoy, 51 Cal. 618; Daw v. Vreeland, 3 Stew. (N. J. Eq.) 542; Merritt v. Campbell, 79 N. Y. 625; Treadwell v. Lennig, 50 Fed. 872. Where a defendant is asked on cross examination as to conversations after decedent's death, the way is not opened for a general examination as to conversations with the decedent on the same subject-matter. Lahey v. Heenan, 81 Pa. St. 185. While one defendant may be examined and testify as to transactions against

admitted as against them and testifies generally, the court, upon proper request, should instruct the jury to disregard such testimony so far as it is incompetent against the estate.<sup>55</sup>

**§ 738. Transactions with decedents—Discretion of court—Right to examine adverse party.**—Some of the statutes, while providing that witnesses shall not be competent against the estate as to transactions with the decedent in his lifetime, give the court discretion to permit them to testify when it seems necessary in order to accomplish justice. It is also frequently provided that a party may call and examine the adverse party, in interest, and it would seem that, even in the absence of such an express provision, a statute merely making the adverse party incompetent to testify for himself, would not prevent the executor or representative of the decedent from calling him. It has been held, under a statute giving the court discretion to call any party and giving a party the absolute right to call his adversary in interest, that the discretion of the court to refuse to permit an incompetent witness to testify is practically absolute,<sup>56</sup> and that, on the other hand, a judgment will not readily be reversed on appeal because such evidence was admitted in the exercise of the trial court's discretion, so long as it was not abused.<sup>57</sup> But the same court has also held that overruling an objection to the testimony of a witness, neither called by the court nor the party to whom he is adverse, is not the exercise of discretion contemplated by the statute, is not equivalent to calling the witness by the court, and is reversible error if the witness is incompetent.<sup>58</sup> It is also reversible error, under such a statute, for the court to refuse a party the right to examine the other party whose interest is adverse to his own.<sup>59</sup>

**§ 739. Other classes of persons held incompetent.**—As to other classes of persons held incompetent at common law because of interest, the subject is now of so little practical importance and the cases

his own interest, he cannot be examined and testify against the interest of his co-defendants. *Weinstein v. Patrick*, 75 N. Car. 344. See, also, *Hubbell v. Hubbell*, 22 Ohio St. 208.

<sup>55</sup> *Eppert v. Hall*, 133 Ind. 417, 31 N. E. 74.

<sup>56</sup> *Forgerson v. Smith*, 104 Ind. 246, 3 N. E. 866.

<sup>57</sup> *Willetts v. Schuyler*, 3 Ind. App. 118, 29 N. E. 273; *Talbott v. Barber*, 11 Ind. App. 1, 38 N. E. 478. See, also, *Perrill v. Nichols*, 89 Md. 444.

<sup>58</sup> *Cupp v. Ayres*, 89 Ind. 60.

<sup>59</sup> *Owings v. Jones*, 151 Ind. 30, 51 N. E. 82; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726.

are so numerous that it would unduly and unprofitably extend this work to review the authorities or consider the subject at length. Witnesses were held incompetent as to some matters, but not always as to all, where the following relationships existed between the witness and the party: That of parent and child;<sup>60</sup> that of guardian and ward,<sup>61</sup> and that of grantor and grantee in certain cases but not always.<sup>62</sup> A similar rule applied in many instances in which the relation of mortgagor and mortgagee existed, but in some in-

<sup>60</sup> *Cushman v. Blakesly*, 3 Greene (Iowa), 542; *Botts v. Fitzpatrick*, 5 B. Mon. (Ky.) 397; *Hargis Succession*, 3 La. Ann. 142; *McIntyre v. Ledyard, &c. Co.* 1 Smed. & M. (Miss. Ch.) 91; *Lazare v. Jacques*, 15 La. Ann. 599; *McKinney v. McKinney*, 2 Stew. (Ala.) 17. When competent: *Highberger v. Stiffler*, 21 Md. 338; *Keen v. Sprague*, 3 Me. 77. Compare *Belt v. Miles*, 4 Har. & M. (Md.) 536. In a criminal action the son is competent for the father, but not in a civil action, to recover a penalty. *State v. Thompson*, 10 La. Ann. 122. As to a mother-in-law testifying for her son-in-law see *Hall v. Hill*, 6 La. Ann. 745; *Groves v. Steel*, 2 La. Ann. 480; *King v. Neeley*, 14 La. Ann. 165. In an action for damages for causing the death of a person the mother of decedent is competent. *Quin v. Moore*, 15 N. Y. 432.

<sup>61</sup> *Padgett v. Padgett*, 41 Ala. 382; *Stein v. Robertson*, 30 Ala. 286; *Hungerford v. Bourne*, 3 Gill & J. (Md.) 133; *Murphy v. Hubble*, 2 Duv. (Ky.) 247. In the following cases the guardian was held competent: *Brand v. Abbott*, 42 Ala. 499; *Bogia v. Darden*, 45 Ala. 269; *Todd v. Dysant*, 23 Tex. 590. A guardian ad litem is incompetent. *Hahn v. Van Dosen*, 1 E. D. Smith (N. Y.) 411; *Pryor v. Ryburn*, 16

Ark. 671. Contra: *McCullough v. McCullough*, 31 Mo. 226; *Murphy v. Murphy*, 24 Mo. 526. A guardian was allowed to testify as to the competency of his ward to make a will. *Howard v. Coke*, 7 B. Mon. (Ky.) 655. A guardian's competency may be restored by his release of interest. *Harvey v. Coffin*, 5 Blackf. (Ind.) 566. In an action by the guardian to recover his ward's money in the hands of an administrator, the ward is a competent witness for the guardian. *Bowman v. Stiles*, 34 Mo. 141.

<sup>62</sup> Where a grantor has conveyed land with a warranty, in any suit involving the title where he could be called to protect his warranty, he is incompetent. *Harris v. Fletcher*, 10 N. H. 20; *Prescott v. Hawkins*, 22 N. H. 191; *Goodman v. Losey*, 3 W. & S. (Pa.) 526. If the suit involves questions which do not affect the liability of the grantor on his warranty he is competent. *Blaisdell v. Cowell*, 14 Me. 370; *Beach v. Sutton*, 5 Vt. 209; *Twambly v. Henley*, 4 Mass. 441; *Sweitzer v. Meese*, 6 Bin. (Pa.) 500; *Stewart v. Chadwick*, 8 Iowa, 463; *Van Neys v. Terhune*, 3 Johns Cas. (N. Y.) 81; *Hull v. Fuller*, 7 Vt. 100; *Doe v. Jackson*, 1 Douglas (Eng.) 175; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Nichols v.*

stances either or both would be competent, even at common law.<sup>63</sup> So, a lessor or lessee who had signed the lease was not competent to impeach it,<sup>64</sup> nor was a tenant competent in an action against

Hotchkiss, 2 Day's Cases in Error (Conn.) 121. See, also, *Herbert v. Herbert*, 1 Ill. 354, 27; *Myers v. Brownell*, 1 D. Chip. (Vt.) 448, 455; *Hamilton v. Doolittle*, 37 Ill. 473; *Lester v. White*, 44 Ill. 464; *Field v. Snell*, 4 Cush. (Mass.) 504; *Wall v. Nelson*, 3 Litt. (Ky.) 395; *Dayton v. Newman*, 19 Pa. St. 194; *Cooper v. Granberry*, 33 Miss. 117; *Ellis v. Ponton*, 32 Tex. 434. If the grantee is interested in the event of a suit relating to the grant he will be incompetent. *Beach v. Packard*, 10 Vt. 96; *Selser v. Ferriday*, 21 Miss. 698; *Schillinger v. McCann*, 6 Me. 364. He is competent to prove that the deed was never delivered to him. *Jackson v. Sheldon*, 22 Me. 569. He is competent to prove that the deed was made to defraud creditors if it is shown that he was innocent of the fraud. *Hancock v. Horan*, 15 Tex. 507; *Croft v. Arthur*, 3 Desaus. (S. Car.) 223; *Johnson v. Johnson*, 3 Met. (Mass.) 63.

<sup>63</sup> See generally as to their being incompetent. *Hartz v. Woods*, 8 Pa. St. 471; *Hart v. Carpenter*, 36 Mich. 402; *Howard v. Chadbourne*, 3 Me. 461. The mortgagor is incompetent in a suit between prior and subsequent mortgagees. *Sithingtons v. Brown*, 7 Leigh (Va.), 271; *Beverley v. Brooke*, 2 Leigh (Va.), 425. Contra: *Gilman v. Moody*, 43 N. H. 239; *Willard v. Ramsburg*, 22 Md. 206; *Wilcox v. Hill*, 11 Mich. 256. He may prove usury in the mortgage. *Post v. Dart*, 8 Paige (N. Y.), 639; *Brolasky*

*v. Miller*, 1 Stock. (N. J.) 807. He may testify for his grantee to show payment of the mortgage. *Mott v. Clark*, 9 Pa. St. 399. He is competent to prove that part of the land described in the mortgage was put there by mistake. *Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71. The following cases hold the mortgagor competent: *Gunter v. Williams*, 40 Ala. 561; *Price v. Mazange & Co.* 31 Ala. 701; *Carter v. Champion*, 8 Conn. 549; *Howard v. Chadbourne*, 5 Me. 15; *Miller v. Dillon*, 2 T. B. Mon. (Ky.) 73; *Foster v. Berkey*, 8 Minn. 351; *Gage v. Whittier*, 17 N. H. 312; *King v. Bailey*, 8 Mo. 332. A mortgagee of attached property is incompetent to testify in the attachment suit. *Rideout v. Newton*, 17 N. H. 71. In a suit against a mortgagor, mortgagee and assignee of a mortgage to set the same aside as fraudulent, the mortgagee is not a competent witness for his co-defendants to show that he received the mortgage in good faith. *Perrin v. Johnson*, 16 Ind. 72. Mortgagee held competent in *Plympton v. Moore*, 13 Pick. (Mass.) 191; *Smith v. Smith*, 15 N. H. 55; *Indianapolis, &c. R. Co. v. Waggoner*, 16 Ind. 367; *Newkirk v. Burson*, 21 Ind. 129; *Shay v. Pettes*, 35 Ill. 360; *Bigelow v. Smith*, 2 Allen (Mass.), 264; *Shrom v. Williams*, 43 Pa. St. 520.

<sup>64</sup> *Allen v. Holkins*, 1 Day (Conn.) 17. If the lessor is not bound to protect the lessee against trespass he is a competent witness for the

his landlord for forcible entry and detainer.<sup>65</sup> In a suit concerning a decedent's property, his heirs, devisee or legatee is, as a general rule, an incompetent witness unless it is clearly made to appear that he has no interest.<sup>66</sup> But if the distributee or devisee has made a complete release of his interest he will be competent.<sup>67</sup> An administrator, executor or guardian is, as a rule, at common law, incompetent

latter in a suit for trespass. *San-derlin v. Shaw*, 6 Jones (N. Car.) 225; *McCormick v. Bailey*, 10 Cal. 230. Where there are several lessors one is a competent witness for another in a suit by the latter to collect his portion of the rent under the lease. *Gray v. Johnson*, 14 N. H. 414. In an action for an injury to the reversion he is competent. *Pennsylvania, &c. Co. v. Neel*, 54 Pa. St. 9.

<sup>65</sup> In an action of ejectment or forcible entry and detainer against the landlord, his tenant is incompetent. *Doe v. President, &c.* 7 Ind. 641; *Jackson v. Trusdell*, 12 Johns. (N. Y.) 246; *House v. Camp*, 32 Ala. 541; *Doe v. Reynolds*, 27 Ala. 364; *Harris v. Plaut & Co.* 31 Ala. 639. Nor could he be a witness for his landlord as a rule, in any case where the action would affect the land he occupied. *Kuester v. Keck*, 8 Watts & S. (Pa.) 16.

<sup>66</sup> *Brown v. Hicks*, 1 Ark. 232; *Asay v. Hoover*, 5 Pa. St. 21; *Fagin v. Cooley*, 17 Ohio, 44; *Cox v. Wilson*, 2 Ired. (N. Car.) 234; *White v. Derby*, 1 Mass. 239; *Baxter v. Buck*, 10 Vt. 548; *Randall v. Phillips*, 3 Mason (U. S.) 378; *Abercrombie v. Hall*, 6 Ala. 657; *Sawyer v. Tappan*, 14 N. H. 352. See *Butt v. Butt*, 1 Ohio St. 222; *Gunnison v. Lane*, 45 Me. 165; *Nash v. Reed*, 46 Me. 168; *Roberts v. Tra-  
wick*, 17 Ala. 55; *Cardwell v. Sprigg*, 1 B. Mon. (Ky.) 369; *Har-*

*ris v. Morris*, 4 Md. Ch. 529; *Reed v. Gilbert*, 32 Me. 519; *Spann v. Ballard*, 1 Rice (S. Car.), 440; *Sylvester v. Downer*, 20 Vt. 355; *Hall v. Hall*, 17 Pick. (Mass.) 373; *Canfield v. Ball*, 8 N. J. Eq. 582; *Winant v. Winant*, 1 Murph. (N. Car.) 148; *Jackson v. Nelson*, 6 Cow. (N. Y.) 248; *Lee v. Dill*, 39 Barb. (N. Y.) 516; *Norris v. Johnston*, 5 Pa. St. 287; *Gamache v. Gambs*, 52 Mo. 287; *Kirksey v. Kirksey*, 41 Ala. 626; *Foster v. Nowlin*, 4 Mo. 18; *Anderson v. Primrose*, *Dudley* (Ga.), 216; *Carter v. Graves*, 7 Miss. 9; *McLemore v. Nuckolls*, 37 Ala. 662; *Penn v. Watson*, 20 Mo. 13; *Denny v. Booker*, 2 Bibb (Ky.), 427; *Spears v. Burton*, 31 Miss. 547; *Perry v. McGuire*, 31 Mo. 287; *Cox v. McKean*, 56 Pa. St. 243. Where the controverted question is as to the mental capacity of a person to execute a will heirs and devisees are competent witnesses upon that question, although the statute prohibits heirs; devisees or other interested parties from testifying as to matters which occurred prior to the testator's death. *Lamb v. Lamb*, 105 Ind. 458, 5 N. E. 171; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911.

<sup>67</sup> *Boynton v. Turner*, 13 Mass. 391; *Hall v. Alexander*, 9 Ala. 219; *Dent v. Postword*, 17 Ala. 242; *Boon v. Nelson*, 2 Dana (Ky.), 391; *Coate v. Coate*, 37 Ala. 695; *Herndon v. Givens*, 19 Ala. 313. Contra: *King v. King*, 9 N. J. Eq. 44; *Richmond*



in a suit for or against the estate which he represents.<sup>68</sup> In a suit by or against an agent, involving the property of the principal, the latter

*v. Cross*, 13 Mo. 75; *Smith v. Morgan*, 8 Gill & Miller (Md.) 133; *Broadhead v. Jones*, 39 Ala. 96. A legatee is, as a general rule, incompetent. *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Mester v. Zimmerman*, 17 Ill. App. 156; *Leslie v. Sims*, 39 Ala. 161; *Robertson v. Allen*, 16 Ala. 106; *Learey v. Littlejohn*, 1 Murph. (N. Car.) 406; *Campbell v. Tousey*, 7 Cow. (N. Y.) 63, 64; *Strong v. Finch*, Minor (Ala.), 256; *Levers v. Van Buskirk*, 4 Pa. St. 309; *Temple v. Ellett*, 2 Munf. 16 Va. 452. If the legacy has been paid or the legatee has released his interest he becomes competent. *Austin v. Bradley*, 2 Day's Cases in Error (Conn.) 466; *Clealand v. Huey*, 18 Ala. 343; *Martin v. Mitchell*, 28 Ga. 382; *Steininger v. Hock*, 42 Pa. St. 432; *Freeman v. Spalding*, 12 N. Y. 373; *Johnson v. Lewis*, 8 Ga. 460; *Higgins v. Morrison*, 4 Dana (Ky.), 100.

<sup>68</sup>*Parker v. Moore*, 2 La. Ann. 1017; *Sears v. Dillingham*, 12 Mass. 358; *Fenwick v. Forrest*, 6 Har. & J. (Md.) 415; *Bellamy v. Cains*, 3 Rich. (S. Car.), 354; *Fox v. Whitney*, 16 Mass. 118; *McIntyre v. Ledyard, &c. Co.* 1 Smed. & M. (Miss. Ch.) 91. Where the action is between third persons they are competent. *Lock v. Noyes*, 9 N. H. 430; *Walden v. Smith*, 29 Ala. 417; *Miller v. Thatcher*, 9 Tex. 482; *Christman v. Siegfried*, 5 W. & S. (Pa.) 400; *Clark v. Burnside*, 15 Ill. 62; *Young v. Warne*, 2 Rob. (Va.) 420; *Hooper v. Royster*, 1

Munf. (Va.) 119. See *Raymond v. Simonson*, 4 Blackf. (Ind.) 77. An executor is a competent witness to prove a will. *Coalter v. Bryan*, 1 Gratt. (Va.) 18; *McDaniel's Will*, 2 J. J. Marsh (25 Ky.) 331; *Leckey v. Cunningham*, 56 Pa. St. 370; *Comstock v. Hadlyme, &c. Society*, 8 Conn. 254; *Millay v. Wiley*, 46 Me. 230; *Kelly v. Miller*, 39 Miss. 171. Contra: *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Hayden v. Loomiss*, 2 Root (Conn.) 350. Where the representative resigns or is removed he is rendered competent if he has discharged all his liability. *Blakey v. Blakey*, 33 Ala. 611; *Walker v. Mock*, 39 Ala. 568; *Wiggin v. Plummer*, 31 N. H. 251; *Burritt v. Silliman*, 13 N. Y. 93; *Anderson v. Irvine*, 6 B. Mon. (Ky.) 231. It is proper to observe that under the statutes in many of the states an heir, devisee, or other interested party may be a competent witness as to matters which occur subsequent to the death of the decedent, but incompetent as to matters which occurred prior to the decedent's death. The policy of such statutes has often been declared to be to prevent one who is interested from testifying where the "lips of the person whose transactions or conversations are the subject of the testimony are sealed in death." *Maladay v. McEnay*, 30 Md. 273; *Peacock v. Albin*, 39 Md. 25, 32; *Abshire v. Williams*, 76 Ind. 97; *Wiseman v. Wiseman*, 73 Ind. 112.

is incompetent at common law, where his interest is involved or may be affected by the judgment as a witness for the former.<sup>69</sup>

Where a bankrupt has received his discharge he is generally held to be a competent witness in all actions by or against the assignee.<sup>70</sup> If, however, his testimony tends to increase the funds he is generally incompetent, unless he releases the assignee from all liability for claim to the surplus.<sup>70\*</sup> Where a person deposits money, or goes on the bail bond for the appearance of a prisoner, he becomes interested to such an extent as to render him incompetent at common law as a witness in the trial of the person for whom he became bail.<sup>71</sup> An at-

<sup>69</sup> *Sherman v. Bruce*, 37 Ill. 39; *Hayes v. Grier*, 4 Binn. (Pa.) 80; *Russell v. McKenzie*, 13 Md. 560; *Wallace v. Peck*, 12 Ala. 768. The agent was permitted to testify upon the ground of necessity in the following cases: *State v. Halloway*, 8 Blackf. (Ind.) 45; *Salas v. Cay, &c. Co.* 12 Rich. (S. Car.) 558; *Manaway v. State*, 44 Ala. 375; *Rice v. Gove*, 22 Pick. (Mass.) 158; *Croom v. Noll*, 6 Fla. 52; *Cadwell v. Meek*, 17 Ill. 220; *Downer v. Button*, 26 N. H. 338; *Chapin v. Siger*, 4 McLean (U. S.) 378; *Phelps v. Hodge*, 6 La. Ann. 524; *Tomlinson v. Spencer*, 5 Cal. 291; *Covington v. Bussey*, 4 McCord (S. Car.) 412; *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449; *Doe v. Himelich*, 4 Blackf. (Ind.) 494; *Wainwright v. Straw*, 15 Vt. 215; *Mills v. Beard*, 19 Cal. 158; *Harrison v. Tulane*, 3 Ala. 534; *Nichols v. Guibor*, 20 Ill. 285; *Ames v. St. Paul, &c. R. Co.* 12 Minn. 413; *Grayson v. Bannon*, 8 Watts. (Pa.) 524; *Governor v. Gee*, 19 Ala. 199. It has been held that the agent may testify as to his understanding of contracts made by him for his principal, but not as to the understanding of the party with whom the contract is made. *Lytle v. Bond*, 40 Vt. 618; *Linsley v. Lovely*, 26

Vt. 123. Where the agent has been guilty of negligence or wrong-doing and a suit is brought against the principal, or where the agent has a direct interest in the event, he will not be allowed to testify. *Railroad Co. v. Kidd*, 7 Dana (Ky.) 245; *Christy v. Smith*, 23 Vt. 663; *Stearn, &c. Co. v. Dandridge*, 8 Gill & J. (Md.) 248; *Ware v. Bennett*, 18 Tex. 794; *Struthers v. Kendall*, 41 Pa. St. 214; *McClure v. Whitesides*, 2 Ind. 573; *Lankford v. Keith*, 21 Ala. 342; *Knap v. Sacket*, 1 Root (Conn.), 501.

<sup>70</sup> *Wright v. Rogers*, 3 McLean (U. S.) 229; *Boas v. Hetzel*, 3 Pa. St. 298; *Onion v. Fullerton*, 19 Vt. 317; *Strong v. Clawson*, 10 Ill. 346; *West v. Creditors*, 1 La. Ann. 365.

<sup>70\*</sup> *Coleman v. Tebbetts*, 20 N. H. 408; *Coit v. Owen*, 3 Desaus. (S. Car.) 175; *Bridges v. Armour*, 5 How. (U. S.) 91; *Cully v. Ross*, 7 Blackf. (Ind.) 312; *Houston v. Prowitt*, 8 Ala. 846; *Dean v. Speakman*, 7 Blackf. (Ind.) 317; *Oldham v. McCormick*, 8 Blackf. (Ind.) 387. Contra: If his testimony tends to decrease the funds. *Colgin v. Redman*, 20 Ala. 650.

<sup>71</sup> *Niles v. Brackett*, 15 Mass. 378; *Lacon v. Higgins*, 3 Starkie (Eng.), 178; *Cates v. Noble*, 33 Me. 258. See *Bell v. Cowgell*, 1 Ashm. (Pa.) 7;

torney is incompetent at common law if he is liable for costs or is otherwise substantially interested, as where his fee is contingent upon his success or the amount of the recovery.<sup>72</sup>

In private corporations, organized to make money, where membership is acquired by the purchase of shares of stock, the stockholders being interested, they are, in the absence of a statute or change in the common law rule, incompetent witnesses in suits involving the corporate property.<sup>73</sup> Members of municipal, charitable and eleemosynary

Andrews v. State, 4 Wis. 401; Butler v. Warren, 11 Johns. (N. Y.), 57. By deposit of money by prisoner in place of a bond or by his surrender to the officers of the court his former bail may be allowed to testify. Beckley v. Freeman, 15 Pick. (Mass.) 468; Hutton v. Reuben, 2 Chit. 103; Tompkins v. Curtis, 3 Cow. (N. Y.) 251; Comstock v. Paie, 3 Rob. (La.) 440.

<sup>72</sup> Chaffee v. Thomas, 7 Cow. (N. Y.) 358; Meserve v. Hicks, 24 N. H. 295; McLaughlin v. Shields, 12 Pa. St. 283; Hall v. Acklen, 9 La. Ann. 219; Dailey v. Monday, 32 Tex. 141; Com. v. Moore, 5 J. J. Marsh (Ky.) 655. But he is competent if he is to receive a certain and fixed fee. McGehee v. Hansell, 13 Ala. 17; Morrow v. Parkman, 14 Ala. 769; Quarles v. Weldron, 20 Ala. 217. He was held competent in the following cases: Braine v. Spalding, 52 Pa. St. 247; Covington v. Holabird, 17 Conn. 530; Morgan v. Roberts, 38 Ill. 65; Bell v. Bell, 12 Pa. St. 235; Rea v. Trotter, 26 Gratt. (Va.) 585; Gaul v. Groat, 1 Cow. (N. Y.) 113; Cox v. Hill, 3 Ohio, 411; Benton v. Henry, 2 Coldw. (Tenn.) 83; State v. Cook, 23 La. Ann. 347; McGehee v. Hansell, 13 Ala. 17; Morrow v. Parkman, 14 Ala. 769.

<sup>73</sup> Southern, &c. Co. v. Cole, 4 Fla. 359; Montgomery, &c. Co. v. Webb,

27 Ala. 618; Thrasher v. Pike County, 25 Ill. 340; Jefferson v. Stewart, 4 Harr. (Del.) 82; Davies v. Morgan, 1 Tyrwh. (Eng.) 457; Mokelumne Co. v. Woodbury, 14 Cal. 265; Maysville v. Shultz, 3 Dana (Ky.), 13; Digby v. Kenton Iron Co. 8 Bush (Ky.), 166. A stockholder could sell his shares and become competent. See McAuley v. Mining Co. 6 Cal. 80; Tuo-lumne Co. v. Columbia Co. 10 Cal. 193; Foundry Co. v. Hovey, 21 Pick. (Mass.) 417, 453; Insurance Co. v. Cadwell, 3 Wend. (N. Y.) 296; Smith v. Tallassee, &c. Co. 30 Ala. 650; Bank v. Owen, 4 Humph. (Tenn.) 338. As to collateral and incidental matters which did not go directly to the issue involved in the suit or immediately affect his interest he was competent. Cooper v. Sisters, &c. 16 Ind. 164; Peake v. Wabash R. Co. 18 Ill. 88; Bleu v. Bear River Co. 20 Cal. 602; Wiggin v. Church, 8 Metc. (Mass.) 301; York, &c. R. Co. v. Pratt, 40 Me. 447; Fell v. McHenry, 42 Pa. St. 41. By statute a corporate shareholder is now a competent witness in the greater number of the jurisdictions of this country. Wolf v. St. Louis Co. 15 Cal. 319; Watson v. Lisbon Bridge, 14 Me. 201; Unthank v. Henry Co. Tp. Co. 6 Ind. 125; Alabama, &c. R. Co. v. Sanford, 36 Ala. 703; United States v.

ary corporations, however, are competent witnesses in suits involving the corporate property.<sup>74</sup>

At common law prosecutors and informers were held to be incompetent witnesses in a prosecution which they had set on foot.<sup>75</sup> But, on grounds of public policy, and to prevent a failure of justice, nearly all the later cases hold them competent.<sup>76</sup> A principal on a bond is not a competent witness for his surety in an action on the bond.<sup>77</sup> But the surety could release the principal and thus make him a competent witness.<sup>77\*</sup>

One partner cannot testify at common law either for or against his co-partner, where there is no release of interest, in a matter in which

Johns, 4 Dall. (U. S.) 412; Leominster v. Fitchburg, &c. R. Co. 7 Allen (Mass.) 38; Bank v. Bates, 11 Conn. 519; National Ins. Co. v. Crane, 16 Md. 260; Porter v. Bank of Rutland, 19 Vt. 410.

<sup>74</sup> M. E. Church v. Wood, 5 Ohio, 283; Ezell v. Justices, &c. 3 Head (Tenn.) 583; Barada v. Inhabitants, &c. 8 Mo. 644; State v. Bradish, 14 Mass. 296; Davies v. Morris, 17 Pa. St. 205; Smith v. Barber, 1 Root (Conn.) 207; Canning v. Pinkham, 1 N. H. 353; Mayor, &c. v. Wright, 2 Port. (Ala.) 230; Nann v. Yazoo City, 31 Miss. 574; Sawyer v. City of Alton, 4 Ill. 127; State v. Woodward, 34 Me. 293; Hebrew Congregation v. United States, 6 Ct of Cl. 241; Trapnall v. Burton, 24 Ark. 371; Burdine v. Grand Lodge, &c. 37 Ala. 478; Ministerial, &c. Fund v. Reed, 39 Me. 41; Middletown Sav. Bank v. Bates, 11 Conn. 519; Hershy v. Clarksville Institute, 15 Ark. 128; Sorg v. First German Congregation, 63 Pa. St. 156. But where the interest is personal and direct and not common to all the members of the corporation, the member thus interested is incompetent. Gould v. James, 6 Cow. (N. Y.) 369; Lufkin v. Haskell, 3 Pick.

(Mass.) 356; Moore v. Griffin, 22 Me. 350.

<sup>75</sup> See Rex v. Broughton, 2 Str. 1229; Rex v. Ellis, 2 Str. 1104.

<sup>76</sup> Murphy v. State, 28 Miss. 637; Lemon v. State, 19 Ark. 171; State v. Truss, 9 Port. (Ala.) 126; Bohannon v. State, 73 Ala. 47; State v. Bennett, 1 Root. (Conn.) 249; People v. Cunningham, 1 Den. (N. Y.) 524; Gilliam's Case, 4 Leigh (Va.), 688; State v. McGrew, 13 Rich. (S. Car.) 316; State v. Blennerhassett, 1 Miss. 7; United States v. Patterson, 3 McLean (U. S.) 299.

<sup>77</sup> Kelly v. Lank, 7 B. Mon. (Ky.) 220; Hale v. Wetmore, 4 Ohio St. 600; Wing v. Andrews, 59 Me. 505; Vandiver v. Glaspy, 7 Rich. (S. Car.) 14; Riddle v. Moss, 7 Cranch (U. S.), 206; Garrett v. Ferguson, 9 Mo. 125; Commonwealth v. McKee, 2 Grant (Pa.) 27.

<sup>77\*</sup> Marshall v. Franklin Bank, 25 St. 384; Cleveland v. Covington, 3 Strobbh. (S. Car.) 184; Hurst v. Word, 3 Head (Tenn.), 564; Pogue v. Joyner, 7 Ark. 462; Field v. Davidson, 9 B. Mon. (Ky.) 77; Holland v. Chambers, 22 Ga. 193. Where one surety sues the other for contribution their principal is a competent witness. Hunt v. Chambliss, 7

the partnership is interested.<sup>78</sup> One co-defendant cannot release the interest of his partner, his co-defendant, so as to become competent<sup>79</sup>

Smed. & M. (Miss.) 532; Leavenworth v. Pope, 6 Pick. (Mass.) 419. If the surety is directly interested in the event he is incompetent. State Bank v. Littlejohn, 2 Dev. (N. Car.) 381; Reigart v. Hix, 14 S. & R. (Pa.) 134. See, also, Colgin v. State Bank, 11 Ala. 222. Where the surety's interest is contingent, or in the question merely or if willing to testify against his interest, he is competent. Covington, &c. R. Co. v. Ingles, 15 B. Mon. (Ky.) 637; Townshend v. Townshend, 6 Md. 295; Kimball v. Thompson, 4 Cush. (Mass.) 441; Hill v. Hill, 32 Pa. St. 511; Craig v. Callaway County Ct. 12 Mo. 94.

<sup>78</sup> Spaulding v. Smith, 10 Me. 363; Purviance v. Dryden, 3 S. & R. (Pa.) 402; Scott v. Bandy, 2 Head (Tenn.) 197; Foster v. Hall, 4 Humph. (Tenn.) 346; Miller v. McClenachan, 1 Yeates (Pa.), 144. One partner is competent for the other if the suit involves no joint interest. Ward v. Coulter, 1 South (N. J.) 236; Mooreman v. De Graffenread, 2 Mill (S. Car.) 195. See, also, Sloan v. Bangs, 11 Rich. (S. Car.) 97; Grant v. Shurter, 1 Wend. (N. Y.) 148. A release of interest renders the witness competent. Churchill v. Bailey, 13 Me. 64; Curcier v. Pennock, 14 S. & R. (Pa.) 51; Ward v. Chase, 35 Me. 515; Thompson v. Franks, 37 Pa. St. 327. Where the firm brings a suit one member of it cannot release his interest so as to become a witness, unless the defendant consents or the court so orders. White v. Tucker, 9 Iowa, 100; Loomis v. Loomis, 26 Vt. 198; Thrall v. Seward, 37 Vt. 573; Lyon

v. Daniels, 14 Pa. St. 197; Chapman v. Andrews, 3 Wend. (N. Y.) 240; Thomas v. Brady, 10 Pa. St. 164. Where one partner is not made a party defendant to suit he is nevertheless incompetent because he would be interested in what was either gained or lost by the suit. Hurd v. Brown, 25 Ill. 504; Porter v. Wilson, 13 Pa. St. 641; Cochran v. Cunningham, 16 Ala. 448; Ransom v. Keyes, 9 Cow. (N. Y.) 128; Myers v. Gilbert, 18 Ala. 467; Hooker v. Johnson, 8 Fla. 453; Bill v. Porter, 9 Conn. 23. Contra: Cummins v. Coffin, 7 Ired. (N. Car.) 196; Weston v. Hunt, 19 Mo. 505.

<sup>79</sup> Cline v. Little, 5 Blackf. (Ind.) 486; Tomkins v. Beers, 2 Root (Conn.) 498; Wells v. Pack, 23 Pa. St. 155; Black v. Marvin, 2 P. & W. (Pa.) 138. A dormant partner is incompetent. Wood v. Connell, 2 Whart. (Pa.) 542. Where a partner has assigned his interest and been released from all liability by the other members of the firm, he is a competent witness to support a debt due the firm before he retired. Hosack v. Rogers, 25 Wend. (N. Y.) 313. But his testimony is regarded with suspicion. McLaughlin, &c. Co. v. Sauve, 13 La. Ann. 99. After dissolution partners are not competent to prove matters occurring before dissolution. Crymes v. White, 37 Ala. 549. See Merrit v. Pollys, 16 B. Mon. (Ky.) 355; White v. Jones, 14 La. Ann. 681. Where a person owing the firm at the time it was dissolved settled his indebtedness by giving his separate note to each partner for their proportionate part of the debt, and

at common law; nor can one joint owner testify for the other where the title to the joint property is in controversy.<sup>80</sup>

The simple fact that one is the seller of property does not disqualify him, and if there can be no recourse against a vendor for a defective title in the property he sold, he may be a competent witness for his vendee.<sup>81</sup> So, where two parties, sustaining the same relation to the vendor, claim the property sold, his interest being balanced, he is a competent witness for either.<sup>81\*</sup> So, where the vender sues a person who guaranteed the payment, the purchaser may be a competent witness for the plaintiff.<sup>82</sup> A vendee is competent, so far as the question of

suit was afterwards brought on one of the notes, one partner was held to be a competent witness for the other bringing the suit. *Morse v. Green*, 13 N. H. 32. See, also, *White v. Tudor*, 24 Tex. 639; *Whitehead v. Bank, &c.* 2 W. & S. (Pa.) 172. The widow of a deceased partner cannot testify in a suit where her testimony tends to increase the assets in which she is entitled to share. *Allen v. Blanchard*, 9 Cow. (N. Y.) 631.

<sup>80</sup> *Caldwell v. Cole*, 13 Me. 120. He cannot testify against his joint owner to prove the fact of joint ownership. *Aston v. Jemison*, 17 Ala. 61. See, generally, *Lee v. Murray*, 12 Mo. 280; *Marquand v. Webb* 16 Johns. (N. Y.) 89; *Farmer v. McCraw*, 31 Ala. 659; *Lufkin v. Patterson*, 38 Me. 282. Where one joint owner sues for insurance which was held on his part, in which the other joint owner has no interest, the latter is competent. *Ruan v. Gardner*, 1 Wash. (U. S.) 145.

<sup>81</sup> *Cannon v. White*, 16 La. Ann. 85; *Connelly v. Chiles*, 2 A. K. Marsh. 9 Ky. 242; *Mahone v. Yauncey*, 14 Ala. 395; *Finlay v. Humble*, 2, A. K. Marsh. (Ky.) 509; *Lackey v. Stouder*, 2 Ind. 376. In a suit

between the purchaser and some third person involving the property, in no way affecting the vendor, he was a competent witness for the purchaser. *Ellis v. Ellis*, 39 Me. 532; *Crosby v. Nichols*, 3 Bosw. (N. Y.) 450; *Zackowski v. Jones*, 20 Ala. 189; *Coghill v. Boring*, 15 Cal. 213; *Cox v. Hall*, 18 Vt. 191; *Waller v. Parker*, 5 Coldw. (Tenn.) 476; *Goodrich v. Hanson*, 33 Ill. 499; *Sawyer v. Ware*, 36 Ala. 675; *Graham v. McCreary*, 40 Pa. St. 515.

<sup>81\*</sup> *Warner v. Carlton*, 22 Ill. 415; *Miller v. Fitch*, 7 W. & S. (Pa.) 366; *Butler v. Tufts*, 13 Me. 302; *Nichols v. Patten*, 18 Me. 231; *Jones v. Park*, 1 Stew. (Ala.) 419; *Ward v. Chase*, 35 Me. 515; *Morrison v. Fowler*, 18 Me. 402; *Frost v. Hill*, 3 Wend. (N. Y.) 386.

<sup>82</sup> *Smith v. Bainbridge*, 6 Blackf. (Ind.) 12. See other cases where the purchaser has been held competent. *Seymour v. Wilson*, 14 N. Y. 567; *Downs v. Belden*, 46 Vt. 674; *Turley v. Brewster*, 33 Tex. 188; *Cutter v. Rathbun*, 3 Hill (N. Y.) 577; *Stafford v. Ames*, 9 Pa. St. 343; *Edwards v. Currier*, 43 Me. 474; *Mumma v. McKee*, 10 Iowa, 107; *Loud v. Pierce*, 25 Me. 233; *Kingsbury v. Smith*, 13 N. H. 109.

interest is concerned, in a suit between his vendor and a third person, where his interests are not involved.<sup>83</sup>

Where a warrantor is called as a witness in a suit involving his liability on his covenants of warranty, he is held to have such an interest at common law as to render him incompetent.<sup>84</sup> But, if he is called to impeach the title which he warrants, his testimony is against his interest and may be received.<sup>84\*</sup> Where one only of two obligors is sued, the other is competent for the one sued.<sup>85</sup>

A vendor of land where the sale is by quit claim deed is competent. *Swisher v. Williams*, *Wright* (Ohio), 754; *Johnson v. Parks*, 10 Cal. 446, or by deed without warranty. *Johnston v. Eckhart*, 3 Yeates (Pa.), 427; *Hyman v. Bailey* 15 La. Ann. 560. See, generally, *Summers v. Wallace*, 9 Watts (Pa.) 161; *Garner v. Bridges*, 38 Ala. 276; *Rowe v. Bradley*, 12 Cal. 226; *Jones v. Love*, 9 Cal. 68; *Cleavinger v. Reimar*, 3 W. & S. (Pa.) 486. His testimony will be admitted where it tends to invalidate his own deed. *Brown v. Downing*, 4 S. & R. (Pa.) 494; *Stevenson v. Chapman*, 12 N. H. 524; *Barrett v. French*, 1 Conn. 354; *Seymour v. Beach*, 4 Vt. 493; *McFerran v. Powers*, 1 S. & R. (Pa.) 102. An attorney who signs a deed is competent to testify for or against it. *Alston v. Jones*, 2 Hayw. (N. Car.) 298. Vendors by warranty are incompetent. *Moore v. McKie*, 5 Smed. & M. (Miss.) 238; *Edwards v. Ballard*, 14 B. Mon. (Ky.) 289; *Elliott v. Boren*, 2 Sheed (Tenn.) 662; *O'Blennis v. Corri*, 5 La. Ann. 102.

<sup>83</sup> *Town v. Wood*, 37 Ill. 512. Where the vendee has reconveyed the land and a suit is brought by the original vendor to foreclose the vendor's lien, the original vendee is a competent witness to show that the last vendee had notice of

the lien. *Ringgold v. Bryan*, 3 Md. Ch. 488. Compare *Messenger v. Armstrong*, 19 Ohio, 41; *Hill v. McLean*, 10 Lea (Tenn.), 107. After the death of the vendor the vendee is incompetent to show that the conveyance was a secret trust. *Clagett v. Hill*, 9 Gill & J. (Md.) 80.

<sup>84</sup> *Meek v. Walthall*, 20 Ark. 648; *McCarron v. Cassidy*, 18 Ark. 34; *Lawrence v. Senter*, 4 Sneed (Tenn.) 52.

<sup>84\*</sup> *Tuttle v. Turner*, 28 Tex. 759; *Robb v. Lefevre*, 7 Iowa, 150. A person may be incompetent because of his implied warranty. *Hale v. Smith*, 6 Me. 416; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Baxter v. Graham*, 5 Watts (Pa.), 418. The warrantor of a title, the validity of which cannot be affected by the suit, is not interested therein. *Loftin v. Nally*, 24 Tex. 565.

<sup>85</sup> *Long v. Ray*, 1 Dana (Ky.) 430; *Williams v. Cummins*, 6 T. B. Mon. (Ky.) 157. In a suit against principal and sureties after judgment by default against the principal, the sureties may release him and use him as a witness in their favor. *United States v. Leffler*, 11 Pet. (U. S.) 86. A sheriff being sued for a failure to issue execution upon a replevin bond, one of the obligors was competent to prove that the bond was not properly executed. *Williams v. Hall*, 2 Dana (Ky.) 97.

An officer is generally competent where he has no other interest, but an officer whose fees depend upon the conviction of an indicted person has been held an incompetent witness to testify against such person.<sup>86</sup>

The assignor of a claim or a chose in action is generally incompetent at common law, to give testimony in a suit thereon.<sup>87</sup> An assignee, holding a note as a pledge, is an incompetent witness for the

See, generally, as to one co-obligor testifying for or against the other co-obligors. *Ex parte Macay*, 84 N. Car. 63; *Ligon v. Durm*, 6 Ired. (N. Car.) 133; *Douglass v. Owens*, 5 Rich. (S. Car.) 149; *Lovett v. Adams*, 3 Wend. (N. Y.) 380; *Calaway County Ct. v. Craig*, 9 Mo. 846. After a bond has been assigned and the assignee brings suit on it the original obligee is competent to show that the obligation of the bond has been discharged, or that the contract was illegal. *Stroh v. Hess*, 1 W. & S. (Pa.) 147; *Canty v. Sumter*, 2 Bay (S. Car.) 93; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Gilliam v. Clay*, 3 Leigh (Va.) 590. A road commissioner in a suit by his successor in office on a bond, being without interest is a competent witness for plaintiff. *Cox v. Way* 3 Blackf. (Ind.) 143.

<sup>86</sup> *Bridgeford v. Lexington*, 7 B. Mon. (Ky.) 47. While he was competent as long as his interest was confined within the scope of his official duties if he acquired any further or additional interest he was incompetent. *Bean v. Lane*, 15 Me. 190. An officer is competent to identify liquors which he had seized because of their being offered for sale unlawfully. *State v. Bartlett*, 47 Me. 396. A notary is a competent witness to prove his own acts in presenting a note for payment and protest, though

liable to plaintiff for negligence. *Cookendorfer v. Preston*, 4 How. (U. S.) 317. So, a bank cashier or teller is a competent witness for the bank to charge a defendant on a promissory note. *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 535; *U. S. Bank v. Stearns*, 15 Wend. (N. Y.) 314. In an action against a sheriff for not delivering an execution to his successor, the successor is not a competent witness to show that it was not delivered to him. *Hughes v. McClelland*, 4 Ind. 92. See *Draper v. Van Horn*, 15 Ind. 155.

<sup>87</sup> *Clifton v. Sharpe*, 15 Ala. 618; *Cox v. Davis*, 16 Ind. 378; *Ketcham v. Hill*, 42 Ind. 64; *Swails v. Coverdill*, 17 Ind. 337; *Adams v. Woods*, 8 Ala. 846; *London, &c. Soc. v. Bank*, 36 Pa. St. 498; *Howerton v. Holt*, 23 Tex. 51. If released from his implied warranty he is competent. *Delee v. Sandel*, 12 La. Ann. 208; *Ludwig v. Meyre*, 5 W. & S. (Pa.) 435. The release cannot be established by the testimony of the assignor. *Post v. Avery*, 5 W. & S. (Pa.) 509; *Bell v. Drew*, 4 E. D. Smith (N. Y.) 59. See, also, *Syphes v. Long*, 4 Watts (Pa.) 253; *Patterson v. Reed*, 7 W. & S. (Pa.) 144; *Phinney v. Tracey*, 1 Pa. St. 173. Where the assignment has been made for the purpose of making the assignor a witness and objection is raised, the burden is upon the



assignor in a suit on the note.<sup>88</sup> The following cases hold that if the witness had no real interest, or his testimony was of such a nature as to have no tendency to show the original instrument void, he was competent.<sup>89</sup> In an action against the acceptor of a bill the drawer is incompetent at common law as a witness for the plaintiff.<sup>90</sup> But, in an action by the holder of a note against an indorser, the maker may be

objecting party to show that the assignment was so made. *Roshing v. Chandler*, 3 Pa. St. 375. Compare *Hendricks v. Ebbitt*, 37 Mo. 24; *Parish v. Frampton*, 32 Mo. 396. Where the court orders an assignment and no security for costs is taken from the assignor his interest is entirely released, and he is a competent witness for the assignee. *Warner v. Turner*, 18 B. Mon. (Ky.) 758. See, also, *Bidwell v. St. Louis, &c. Co.* 40 Mo. 42; *Freeman v. Jennings*, 7 Rich. (S. Car.) 381; *Woolfolk v. McDowell*, 9 Dana (Ky.) 268; *Baring v. Shippen*, 2 Bin. (Pa.) 154; *Caton v. Lenox*, 5 Rand. (Va.) 31; *Johnson v. Blackmar*, 11 Iowa, 324; *Taylor v. Gitt*, 10 Pa. St. 428; *Doub v. Barnes*, 1 Md. Ch. 127.

<sup>88</sup> *Harbin v. Roberts*, 33 Ga. 45. Contra: *Locke v. North Am. &c. Co.* 13 Mass. 61. Where a judgment which has been assigned is afterward reversed the assignee cannot be a witness for the plaintiff. *Stewart v. Conner*, 13 Ala. 94. If there is a second assignment neither of the assignees is competent. *Clover v. Painter*, 2 Pa. St. 46; *Grayson's Appeal*, 5 Pa. St. 395.

<sup>89</sup> *Farvar v. Metts*, 12 Rich. (S. Car.) 667; *Bank, &c. v. Hull*, 7 Mo. 273; *Crayton v. Collins*, 2 McCord, (S. Car.) 457; *Buck v. Appleton*, 14 Me. 284; *Smith v. Downs*, 6 Conn. 365; *Woodhull v. Holmes*,

10 Johns. (N. Y.) 231; *Penny-packer v. Umberger*, 22 Pa. St. 492; *Parker v. Hanson*, 7 Mass. 470; *Wendell v. George*, R. M. Charlt. (Ga.) 51; *Appleton v. Donaldson*, 3 Pa. St. 381; *Warren v. Merry*, 3 Mass. 27; *Vanschack v. Stafford*, 12 Pick. (Mass.) 565. The rule that a party to a negotiable instrument is not a competent witness to impeach the instrument, is not applicable, unless the instrument is negotiated before it falls due. *Rohrer v. Morningstar*, 18 Ohio, 579; *Fox v. Whitney*, 16 Mass. 118.

<sup>90</sup> *Hewitt v. Lovering*, 12 Me. 201; *Scott v. McLellan*, 2 Me. 199; *Denistoun v. Fleming*, 7 Pa. St. 528; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *President, &c. v. Mitchell*, 9 Met. (Mass.) 297; *Jones v. Brooke*, 4 Taunt. 464; *Nichols v. Wright*, 4 Cranch (C. C.) 700; Contra: *Board v. Ackerman*, 5 Esp. 119; *Rich v. Topping*, Peake N. P. 224. A drawer may testify for the acceptor to show that plaintiff is not the owner of the bill if the plaintiff releases him from liability for costs. *Snyder v. Wilt*, 15 Pa. St. 59. In a joint action against the indorsers and drawer of a bill, each of the defendants is interested in the costs of the suit, and hence incompetent. *Scott v. Watkins*, 10 Miss. 233. An acceptor may testify that he had in his hands no funds of

a competent witness for the holder, and there are many cases in which it is so held.<sup>90\*</sup> There is some conflict among the authorities, but in many cases the maker has been held competent to testify to the fact that a note is usurious.<sup>91</sup> After judgment against the maker, or after he suffers a default to be taken against him, or if his liability has been discharged by release, bankruptcy, or the statute of limitations, he may be a competent witness for the other parties to the action, and generally in any suit on the note.<sup>91\*</sup> The question as to the competency of indorsers, indorsees, and sureties or guarantors, has arisen in many cases, and the answer to the question is made to depend largely at common law upon their interest or lack of interest. This, it is evident, as in most of the cases in which the

the drawer, *Kinsley v. Robinson*, 21 Pick. (Mass.) 327; and in an action between drawer and drawee he may testify to the acceptance. *Tarble v. Underwood*, 34 Ill. 67.

<sup>90\*</sup> *Adams v. Moore*, 9 Port. (Ala.) 406; *Woodman v. Eastman*, 10 N. H. 359; *Finn v. Gustin*, 4 E. D. Smith (N. Y.) 382; *Cockrill v. Hobson*, 16 Ala. 391; *Hubbly v. Brown*, 16 Johns. (N. Y.) 70. Contra: *Davenport v. Freeman*, 3 W. & S. (Pa.) 557; *Bank, &c. v. Jones*, 8 Pet. (U. S.) 12. He is competent to show protest and notice of protest, *Eddy v. Peterson*, 22 Ill. 535

<sup>91</sup> *Cushman v. Downing*, 29 Me. 459; *Bank v. Hillard*, 5 Cow. (N. Y.) 153; *Townsend v. Bush*, 1 Conn. 260; *Winkler v. Scudder*, 1 Ga. 108; *Little v. Rogers*, 1 Met. (Mass.) 108; *Moyer v. Gunn*, 12 Wis. 429; *Howell v. Anten*, 1 Green (N. J. Eq.) 44; *Stafford v. Rice*, 5 Cow. (N. Y.) 23; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Hunt v. Edwards*, 4 Har. & J. (Md.) 283; *Fleming v. Mulligan*, 2 McCord, (S. Car.) 173; *Griffith v. Reford*, 1 Rawle, (Pa.) 196. Contra: *Churchill v. Suter*, 4 Mass. 156; *Houghton*

*v. Page*, 1 N. H. 60; *Bank v. Barry*, 17 Mass. 94; *Manning v. Wheatland* 10 Mass. 502.

<sup>91\*</sup> *Austin v. Fuller*, 12 Barb. (N. Y.) 360; *Routh v. Helm*, 6 How. (Miss.) 127; *Bank v. Magurder*, 6 Har. & J. (Md.) 172; *Mevey v. Matthews*, 9 Pa. St. 112; *Vance v. Collins*, 6 Cal. 435; *Kleimann v. Boernstein*, 32 Mo. 311; *Hayden v. McKnight*, 45 Ga. 147; *Peirce v. Butler*, 14 Mass. 303; *Bank v. Fordyce*, 9 Pa. St. 275; *Breitenbach v. Houtz*, 35 Pa. St. 153; *Bank v. Pratt*, 31 Me. 501; *Wheaton v. Wilmarth*, 13 Met. (Mass.) 422; *Bank v. Rollins*, 13 Me. 202; *Bank v. Penick*, 5 T. B. Mon. (Ky.) 25; *Barnett v. Troutman*, 9 Ga. 36; *Hill v. Sweetser*, 5 N. H. 168; *Mitchell v. Cotten*, 3 Fla. 134; *Lamb v. Fox*, 5 B. Mon. (Ky.) 94; *Jones v. Fleming*, 15 La. Ann. 522; *Hogg v. Breckinridge*, 12 Mo. 369; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Bell v. Wilson*, 17 Ohio St. 640. One joint maker, even though not joined as a defendant, is not a competent witness at common law for the other without a release from liability as such or for contribution. Com'l,

question of interest has arisen, depends largely upon the nature and circumstances of the particular case, and we refer to the authorities cited in the note without further comment.<sup>92</sup> The payee of a nego-

&c. Bank v. Lum, 8 Miss. 414; Carleton v. Whitchee, 5 N. H. 196; Miller v. McCagg, 4 Hill, (N. Y.) 35; Marine Bank v. Ferry, 40 Ill. 255; Ames v. Willington, 3 N. H. 115; Jewett v. Davis, 6 N. H. 518; Groat v. Palmer, 7 Wis. 338; Concord Bank v. Rogers, 16 N. H. 9; Kornegay v. Salle, 12 Ala. 534; Kile v. Graham, 1 McCord, (S. Car.) 552.

<sup>92</sup> When competent, see Bryant v. Watrin, 13 Cal. 85; Berry v. Hall, 33 Me. 493; Zeigler v. Gray, 12 S. & R. (Pa.) 42; Tomlinson v. Spencer, 5 Cal. 291; Priest v. Bounds, 25 Cal. 188; Whiteford v. Munroe, 17 Md. 135; Oliver v. President, &c. 11 Humph. (Tenn.) 74; Partee v. Silliman, 44 Miss. 272. An indorser is not competent to impeach the genuineness of the paper sued on. Curtis v. Marrs, 29 Ill. 508; Walton v. Sheely, 1 T. R. 396; Walters v. Witherill, 43 Ill. 388; Lincoln v. Fitch, 42 Me. 456; Smith v. Walters, 23 Ill. 283; Harding v. Mott, 20 Pa. St. 469; Ward v. Tyler, 52 Pa. St. 393; Hayes v. Gorham, 3 Ill. 429; Mitchell v. Cooper, 17 Pa. St. 343; Steinmetz v. Currey, 1 Dall. (U. S.) 234; Hinckley v. Walters, 9 Watts. (Pa.) 179; Jordan v. Davis, 5 Whart. (Pa.) 338; Geoghegan v. Reid, 2 Whart. (Pa.) 152; Bank v. Dunn, 6 Pet. 51 (U. S.) 57; Bank v. Jones, 8 Pet. (U. S.) 12; Scott v. Lloyd, 12 Pet. (U. S.) 145; Dewey v. Warriner, 71 Ill. 198; Cox v. Williams, 17 Mart. (La.) 18; Churchill v. Suter, 4 Mass. 156; Bank v. Pratt, 31 Me. 501; Clapp

v. Hanson, 15 Me. 345; Sweeny v. Easter, 1 Wall. (U. S.) 166, 173; Smyth v. Strader, 4 How. (U. S.) 404. See the contrary. Jordame v. Lashbrooke, 7 T. R. 599; Slack v. Moss, Dud. (Ga.) 161; Freeman v. Brittin, 2 Harr. (N. J.) 192; Knight v. Packard, 3 McCord, (S. Car.) 71; Stump v. Napier, 2 Yerg. (Tenn.) 35; Ringgold v. Tyson, 3 Har. & J. (Md.) 172. The indorser is competent to prove an agreement made with the party to whom the indorsement was made, while the paper is still in the hands of the indorsee and before it has passed into circulation. Fox v. Whitney, 16 Mass. 118; Davis v. Brown, 94 U. S. 423. When the indorsement is special, or the liability of the indorser is limited by the contract of indorsement, he is a competent witness in a suit on the indorsed paper. Perry v. Siter, 37 Mo. 273; Bailey v. Lumpkin, 1 Ga. 392; Abbott v. Mitchell, 18 Me. 355; Boyd v. McIvor, 14 Ala. 593; Merritt v. Merritt, 20 Ill. 65; Billingsby v. Knight, Term (N. Car.) 103. Indorser held competent only where his liability has been fully discharged. Bay v. Gunn, 1 Den. (N. Y.) 108; Lock v. Noyes, 9 N. H. 430; Bradley v. Morris, 4 Ill. 182; Carroll v. Meeks, 3 Port. (Ala.) 226; Todd v. Hardy, 9 Port. (Ala.) 346; Briggs v. Moore, 14 Ala. 433; Evans v. Smith, 34 Me. 33; Bank v. Griffith, 5 Hill, (N. Y.) 476; Hepburn v. Cassel, 6 S. & R. (Pa.) 113. Where the effect of the testimony of a guarantor would be

liable note, who has negotiated it, is a competent witness for a subsequent holder who brings suit against the maker, if a release has been made, and the payee is, indeed, generally competent in suits between the other parties if he is no longer liable or interested.<sup>93</sup> In a prosecution for forging an instrument, the person whose name is alleged to have been forged is usually a competent witness to prove the for-

to render him liable, he is competent. *Mayo v. Avery*, 18 Cal. 309; but if the effect would be to lessen his liability, he is incompetent. *Paine v. Husseg*, 17 Me. 274. He cannot show that a note given by a person whose solvency he guaranteed was without consideration. *Hanna v. Spencer*, 3 Ind. 351. A surety is incompetent to testify for his principal. *Phillips v. Caldwell*, 2 Rich. (S. Car.) 1; *Webb v. Wilshire*, 19 Me. 406; *Nichols v. Bellows*, 22 Vt. 581. Where there are two sureties and one pays the debt of the principal, and then sues the principal to recover the amount paid, the co-surety is a competent witness for the plaintiff. *Benedict v. Hecox*, 18 Wend. (N. Y.) 490. But as to matters which do not affect its validity, such as the time when it negotiated, he is competent. *Smithwick v. Anderson*, 2 Swan. (Tenn.) 573; *Adams v. Cawer*, 6 Me. 390. See, also, *Drake v. Henly*, Walk. (Miss.) 541; *Richardson v. Lincoln*, 5 Met. (Mass.) 201; *Goodwin v. Chadwick*, 35 Me. 193; *Barker v. Prentiss*, 6 Mass. 430; *Girard & Co. v. Marr*, 46 Pa. St. 504. He will be allowed to testify that he has paid the claim in suit. *Warren v. Merry*, 3 Mass. 27; *Bryant v. Ritterbush*, 2 N. H. 212; *Maynard v. Nekewis*, 9 Pa. St. 81; *White v. Kibling*, 11 Johns. (N. Y.) 128.

To the contrary, *Nisbet v. Lawson*, 1 Ga. 275.

<sup>93</sup> *Duncan v. Pindell*, 4 Bibb (Ky.) 330; *Ford v. Hale*, 1 Mon. (Ky.) 23; *Leonard v. Wildes*, 36 Me. 265; *Matheny v. Westfall*, 4 Blackf. (Ind.) 491; *Evans v. Dela*, 35 Pa. St. 451; *Seeley v. Engell*, 17 Barb. (N. Y.) 530; *Calkins v. Packer*, 21 Barb. (N. Y.) 275; *Edgerly v. Shaw*, 25 N. H. 514; *Lane v. Padelford*, 14 Me. 94; *Bank v. Seawell*, 18 Ala. 616; *Davidson v. Love*, 1 Ala. 133; *Hawkins v. Cree*, 37 Pa. St. 494; *Manning v. Manning*, 8 Ala. 138. The payee may testify to the fact that the note has been materially altered or not properly transferred. *Bailey v. Cooper*, 5 Humph. (Tenn.) 400; *Smith v. Cheney*, 1 Hill (S. Car.) 148. The payee is also competent to prove that the note was paid before he transferred it, or to the fact that it was usurious. *Coon v. Nock*, 27 Ill. 235; *Clapp v. Han*, 15 Me. 345; *Rosenberger v. Bitting*, 15 Pa. St. 278; *Smith v. Morgan*, 38 Me. 468; *Fitch v. Hill*, 11 Mass. 286; *Bobs v. Bostick*, 2 Bailey (S. Car.) 106; *Wilson v. Walker*, 4 Houst. (Del.) 96; *Strong v. Wilson*, 1 Morr. (Iowa), 84; *Kobbe v. Landecker*, 32 Mo. 170; *Foreman v. Ahl*, 55 Pa. St. 325; *Williams v. Miller*, 10 Smed. & M. (Miss.) 139; *Bryant v. Ritterbush*, 2 N. H. 212.

gery.<sup>94</sup> A party to a non-negotiable instrument has been held to be a competent witness to impeach its validity, because to such an instrument there can be no bona fide innocent purchaser or assignee who needs protection.<sup>95</sup> It has likewise been held that a borrower of money is competent to prove usury against the lender, if the lender refuses to testify concerning it.<sup>96</sup>

A debtor may be a competent witness in a suit between two of his creditors because his interest is balanced, or, in many other cases, because he has no interest that can be affected by the action.<sup>97</sup>

<sup>94</sup>*Pennsylvania v. Farrel*, Add. (Pa.) 246; *Commonwealth v. Hutchinson*, 1 Mass. 7; *Commonwealth v. Waite*, 5 Mass. 261; *Res publica v. Wright*, 1 Yeates (Pa.) 401; *State v. Phelps*, 11 Vt. 116; *Commonwealth v. Peck*, 1 Met. (Mass. 428; *Bacon v. Minor*, 1 Root, (Conn.) 258; *State v. Whitten*, 1 Hill (S. Car.) 100; *Simmons v. State*, 7 Ohio, 116; *Noble v. People*, 1 Ill. 54; *Commonwealth v. Suell*, 3 Mass. 821; *People v. Dean*, 6 Cow. (N. Y.) 27; *Pope v. Nance*, 1 Stew. (Ala.) 354; *State v. Shurtliff*, 18 Me. 368; *State v. Brunson*, 1 Root (Conn.) 307; *State v. Blodget*, 1 Root (Conn.) 534; *White v. Green*, 5 Jones' Law (N. Car.) 47. Even if there was a civil action pending against the witness, and proof of the forgery would release him, he was, nevertheless, held competent. *Commonwealth v. Peck*, 1 Met. (Mass.) 428.

<sup>95</sup>*Brown v. Babcock*, 3 Mass. 29; *Worcester v. Eaton*, 11 Mass. 368; *Hudson v. Hulbert*, 15 Pick. (Mass.) 423; *Loker v. Haynes*, 11 Mass. 498; *Hill v. Payson*, 3 Mass. 559; *Watts v. Smith*, 24 Miss. 77. Where there are two joint makers to a non-negotiable note, and one is sued thereon, the other, on being released by defendant, may testify

for him. *Cameron v. Paul*, 6 Pa. St. 322.

<sup>96</sup>*Jones v. Kirksey*, 10 Ala. 579; *Thomas v. Brown*, 1 McCord, (S. Car.) 557; *Quarles v. Brannon*, 5 Strobb. (S. Car.) 151; *Smith v. Coopers*, 9 Iowa, 376; *Palmer v. Severance*, 8 Ala. 53; *Campbell v. McHarg*, 9 Iowa, 354. Contra: *Bazemore v. Wilder*, 10 Ala. 773; *Lucas v. Spencer*, 27 Ill. 15.

<sup>97</sup>*Updegraff v. Rowland*, 52 Pa. St. 317; *Ohio, &c. Co. v. Ross*, 2 Md. Ch. 25; *Fenev v. Thompson*, 52 Pa. St. 353; *Philbrook v. Handley*, 27 Me. 53; *Wisner v. Brady*, 11 Iowa, 248; *Aiken v. Kilburne*, 27 Me. 252. He may testify for a bona fide purchaser or a bona fide assignee in a suit between a third person and such purchaser or assignee. *Prince v. Shepard*, 9 Pick. (Mass.) 176; *Caston v. Ballard*, 1 Hill, (S. Car.) 406; *Etter v. Bailey*, 8 Pa. St. 442; *Jackson v. Peck*, 4 Wend. (N. Y.) 300. One joint debtor not sued has been held a competent witness for plaintiff against those sued. *Thornton v. Lane*, 11 Ga. 459; *Gay v. Cary*, 9 Cow. (N. Y.) 44. An execution debtor is a competent witness for the party taking and claiming the property by virtue of the execu-

Trustees and their beneficiaries, one or both, may have such an interest as will render them incompetent at common law, and it has even been held that a mere trustee, liable only for costs, is incompetent in a suit involving the subject matter of his trust.<sup>98</sup> Public policy rather than interest, would seem to exclude the evidence of grand

tion. *Holman v. Arnett*, 4 Port. (Ala.) 63; *Bradbury v. Dougherty*, 7 Blackf. (Ind.) 467; *Clark v. Watson*, 50 Pa. St. 317; *Clifton v. Bogardus*, 2 Ill. 32; *Hankins v. Ingols* 4 Blackf. (Ind.) 35; *Ewing v. Cargill*, 21 Miss. 79; *Hall v. Tuttle*, 8 Wend. (N. Y.) 376. Also against the claimant. *Converse v. McKee*, 14 Tex. 20. If the officer fails to do his duty properly in making and returning the execution, and the execution creditor sues him for such failure, the execution debtor is a competent witness for the officer. *Pillsbury v. Small*, 19 Me. 435; *Walters v. Burnett*, 14 Johns. (N. Y.) 362; *Newell v. Hoadley*, 8 Conn. 381; *Bond v. Brady*, 7 Blackf. (Ind.) 39; *Limpus v. State*, 7 Blackf. (Ind.) 43. As to creditors: A general creditor of a plaintiff may be a competent witness for the plaintiff unless it appears that he has a legal interest in the recovery. *Noyes v. Sturdivant*, 18 Me. 104; *Warne v. Prentiss*, 9 Mo. 544; *Illinois, &c. Co. v. Marseilles Co.* 6 Ill. 236. A creditor has been held competent to show that he holds a claim where the administrator asks leave to sell real estate to pay decedent's debts. *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184. If an estate is solvent a creditor may testify even where his testimony tends to increase the assets out of which debts are to be paid. *Boyes v. Kendall*, 14 S. & R. (Pa.) 178; *Foster v. Wallace*, 2 Mo. 231. If the

estate is insolvent he is incompetent. *Flinn v. Chase*, 4 Den. (N. Y.) 85; *Marre v. Ginochio*, 2 Bradf. (N. Y.) 165. One judgment creditor is held competent to testify in a suit between two other judgment creditors where the suit is to determine which of the two is entitled to the claim. *Brown v. Parkinson*, 56 Pa. St. 336. Compare *Guignard v. Aldrich*, 10 Rich. Eq. (S. Car.) 253; *Seitzinger v. Ridgway*, 4 W. & S. (Pa.) 472. Also in favor of the estate of his judgment debtor, if he has no direct interest in the recovery sought. *Nicholson v. Frazier*, 4 Harr. (Del.) 206; *Jones v. Brownfield*, 2 Pa. St. 55; *Lothrop v. Wightman*, 41 Pa. St. 297.

<sup>98</sup>*Bauerman v. Radenius*, 7 T. R. 668; *Dowdeswell v. Nott*, 2 Vern. 317. A mere naked trustee having no real interest in the action, although a party defendant thereto, is competent for his co-defendant. *Johnson v. Cunningham*, 1 Ala. 249; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Neville v. Demeritt*, 16 N. J. Eq. 275; *Harvey v. Alexander*, 1 Rand. (Va.) 219; *Main v. Newson*, Anth. (N. Y.) 18; *Hardwick v. Hook*, 8 Ga. 354; *Hale v. Meegan*, 39 Mo. 272; *Jones v. Soner*, 1 Dev. & B. (N. Car.) 452; *Taylor v. Moore*, 2 Rand. (Va.) 563. A trustee under a will or deed who has no beneficial interest therein, is a competent witness in a suit involving the validity of the will or deed. Com-

jurors and petit jurors, in most instances in which their testimony is excluded, but they are frequently said to be incompetent in some cases upon the ground of interest. There is some conflict among the authorities as to just how far, and in what cases, they may testify, but at this place and in this connection it is sufficient to refer to the authorities cited in the note below.<sup>\*\*\*</sup>

stock v. Hadlyme, 8 Conn. 254; Montgomery v. Perkins, 2 Metc. (Ky.) 448; Johnson v. Cunningham, 1 Ala. 249; Phipps v. Pitcher, 6 Taunt. 220; Peralta v. Castro, 6 Cal. 354. A trustee who has misused the funds of the trust is incompetent to show why or for what purpose the trust was created. Heartrunft v. Daniels, 43 Ill. 369. After termination of the trust, the trustee is a competent witness in suits involving the title of the trust property, or in regard to claims against the cestui que trust. Southard v. Cushing, 11 B. Mon. (Ky.) 344; Wilson v. Hanson, 20 N. H. 375; McNeill v. Arnold, 17 Ark. 154; Virgin v. Wingfield, 54 Ga. 451. A cestui que trust is incompetent to testify in suits brought by the trustee, on the ground that his testimony tends to increase the property in which he is interested. Bank v. McDade, 4 Port. (Ala.) 252; Campbell v. Galbreath, 5 Watts, (Pa.) 423; Buchanan v. Buchanan, 46 Pa. St. 186; St. John v. American, &c. Co. 2 Duer (N. Y.) 419. He may testify for a plaintiff in a suit against the trustee, because his testimony is clearly against his interest. Petermans v. Lans, 6 Leigh (Va.) 523.

<sup>\*\*\*</sup> See generally as to grand jurors: Note in 12 Am. St. 915-919; State v. Benner, 64 Me. 267; Gordon v. Commonwealth, 92 Pa. St. 216; Clanton v. State, 13 Tex. App. 139; Way v. Butterworth, 106 Mass. 75;

State v. Fassett, 16 Conn. 457; State v. Broughton, 7 Ired. (N. Car.) 96; Thomas v. Commonwealth, 2 Rob. (Va.) 795; Commonwealth v. Mead, 12 Gray (Mass.) 167; State v. Offutt, 4 Blackf. (Ind.) 355; State v. Wood, 53 N. H. 484; Burdick v. Hunt, 43 Ind. 381; Jones v. Turpin, 6 Heisk. (Tenn.) 181; Shattuck v. State, 11 Ind. 473; Louis Case, 4 Me. 439; Commonwealth v. Smith, 9 Mass. 107; McLellan v. Richardson, 13 Me. 82. In a suit for malicious prosecution it is held that a grand juror is a competent witness for the plaintiff to show that the defendant was the prosecutor. Burnham v. Hatfield, 5 Blackf. (Ind.) 21; White v. Fox, 1 Bibb. (Ky.) 369; State v. McDonald, 73 N. Car. 346; Sands v. Robison, 20 Miss. 704; People v. Young, 31 Cal. 564; Rocco v. State, 37 Miss. 357. The affidavit or testimony of a petit juror is not admissible to impeach a verdict which he helped to make. State v. McConkey, 49 Iowa, 499; Stanley v. Sutherland, 54 Ind. 339; Torque v. Carrillo, 1 Ariz. 336; State v. Wallman, 31 La. Ann. 146; State v. Mims, 26 Minn. 183; Ostrander v. People, 28 Hun (N. Y.) 38; Montgomery v. State, 13 Tex. App. 75; State v. Fox, 79 Mo. 109; Meade v. Smith, 16 Conn. 346; Jackson v. Williamson, 2 T. R. 281; United States v. Clements, 3 Hughes (U. S.) 509; State v. Shock, 68 Mo. 552; People v. Sprague, 53 Cal. 491; People v.

§ 740. **Rule under modern law.**—In England, and in almost every jurisdiction of the United States, the common law rule rendering witnesses incompetent because of interest in the event of the suit has been abolished,<sup>99</sup> so that competency, notwithstanding interest, may now be looked upon as the rule, and incompetency the exception.<sup>100</sup>

§ 741. **Restoration to competency—General statement.**—When witnesses were disqualified at common law, by reason of interest, they might be restored to competency by a release of their interest, by assignment of their interest, by payment of the amount of the liability resulting from such interest, by disclaiming all interest, or by being fully indemnified.

Carnell, 2 Edm. Sel. Cas. (N. Y.) 202; State v. Brittain, 89 N. Car. 481; Vaise v. Delaval, 1 T. R. 11; Withers v. Firens, 40 Ind. 131; Torque v. Carrillo, 1 Ariz. 336; Moses v. Cromwell, 78 Va. 671. The following cases hold him competent to impeach the verdict. Hunter v. State, 8 Tex. App. 75; Tenney v. Evans, 13 N. H. 462; Dana v. Tucker, 4 Johns. (N. Y.) 487; Anschicko v. State, 6 Tex. App. 524; Nile v. State, 11 Lea (Tenn.) 694; State v. Ayer, 23 N. H. 301. A petit juror's affidavit is admissible to support the verdict which he helps to make. Jones v. State, 89 Ind. 82; People v. Hunt, 59 Cal. 430; Haun v. Wilson, 28 Ind. 296, where the court said: "The law is well settled by repeated rulings of this court, that the affidavit of jurors cannot be heard to impeach their verdict, but may be for the purpose of sustaining it." State v. Robinson, 20 W. Va. 713; Cook v. Territory, 4 West Coast R. 340; State v. Cartwright, 20 W. Va. 32.

<sup>99</sup> See note 86 Am. Dec. 329; also article 4 Am. Law Reg. N. S. 74, ante § 717.

<sup>100</sup> O'Neal v. Reynolds, 42 Ala. 197; Brand v. Abbott, 42 Ala. 499;

Mobile v. Jones, 42 Ala. 630; Harris v. Plant, 31 Ala. 639; Walthall v. Walthall, 42 Ala. 450; Cowles v. Bacon, 21 Conn. 451; Tarpley v. McWhorter, 56 Ga. 410; Frew v. Clarke, 80 Pa. St. 171; Sheetz v. Haubest, 81 Pa. St. 100; Pratt v. Patterson, 81 Pa. St. 114. The statements herein made respecting the interest that will disqualify, except where it is otherwise indicated, are to be taken as giving the rules of the common law. These rules are yet important even in the states where interest does not ordinarily disqualify, inasmuch as the question of interest is often influential and controlling in matters of guardianship, decedents' estate and the like.

In the federal courts persons interested in the event of the suit are not, as a general rule, disqualified. Texas v. Chiles, 21 Wall. (U. S.) 488; Potter v. National Bank, 102 U. S. 163. The rule applies even where the United States is a party. Green v. United States, 9 Wall. (U. S.) 655. In cases not provided for by the statutes of the United States, the law of the state in which the federal courts sit constitutes the rules of decision as to



• § 742. **Release of interest—In general.**—The competency of a witness disqualified by reason of interest in the event of a suit may generally be restored by a proper and complete release of the interest.<sup>101</sup> Where the interest is vested in the witness he may execute the release himself, but where his interest consists in his being liable to some third person, the third person to whom the witness is liable should

competency. *Potter v. Bank*, 102 U. S. 163; *King v. Worthington*, 104 U. S. 44. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a territory where a different rule prevails. *Good v. Martin*, 95 U. S. 90. Parties claimant or defendant in the court of claims are, by special enactments, incompetent to support their claims or defenses. *Hubbell's Case*, 4 Ct. of Cl. 37. However, to defeat the claim, the United States may use, as a witness, a party whose interests are adverse to those of the claimant. *Bradley v. United States*, 104 U. S. 442. See, also, *Hebrew Congregation v. United States*, 6 Ct. of Cl. 241.

<sup>101</sup> *Robbins v. Butler*, 24 Ill. 387; *Evans v. Hays*, 2 Mo. 97; *Ayres v. Campbell*, 3 Iowa, 582; *Gillespie v. Gillespie*, 2 Bibb. (Ky.) 89; *Patterson v. Fay*, 1 Phila. (Pa.) 473; *Cook v. Grant*, 16 S. & R. (Pa.) 198; *Fairly v. Fairly*, 38 Miss. 280; *City Council v. England*, Riley (S. Car.) 50; *Wills v. Judd*, 26 Vt. 617; *Tobey v. Leonards*, 2 Wall. (U. S.) 423; *Central, &c. R. Co. v. Hines*, 19 Ga. 203; *Tallman v. Dutcher*, 7 Wend. (N. Y.) 180; *Moore v. Rich*, 12 Vt. 563; *Fletcher v. Cole*, 26 Vt. 170; *The Peytona*, 2 Curt. (U. S.) 21; *Robinson v.*

*Tipton*, 31 Ala. 595; *Wampler v. Wampler*, 9 Md. 540. Where a party became interested in a covenant of warranty of a slave, by purchasing an interest in the slave, and had such interest at the time the suit was brought, but sold it to the plaintiff previously to the examination, it was held that he was competent as a witness for the plaintiff. *Henderson v. Crouse*, 7 Jones (N. Car.) 623. A person, who for a nominal consideration, releases his interest in the fund sought to be recovered, although for the purpose of becoming a witness, is competent. *Carter v. Truman*, 7 Pa. St. 315. A party who has transferred all his interest to another without recourse is a competent witness for the latter. *Blackerby v. Holton*, 5 Dana (Ky.) 520. The release by a member of a corporation of his interest in it renders him a competent witness for it. *Smith v. Natchez Steamboat Co.* 1 How. Miss. 479. The written consent of the counsel for the propounder of a will, that the next friend of the caveator and his surety of appeal should be examined as witnesses, as fully as if not parties, prevents the necessity of a motion for their discharge, to make them witnesses. *Varner v. Goldsby*, 22 Ga. 302. A nominal party to a contract, in regard to which a suit in equity is pending, who is so divested of all interest as not to be

execute the release.<sup>102</sup> After the witness has been effectively released, he stands on the same footing as the other witnesses.<sup>103</sup> The interest, however, must be released by the person holding it, or by some duly authorized or empowered person in his behalf.<sup>104</sup> In certain cases, where the material rights of the parties will not be affected, and where there would be a failure of justice by not allowing an interested witness to testify, the court may direct a release in order to render the witness competent.<sup>105</sup> It is well settled that, if all actions or causes of

a necessary party to the bill, is a competent witness in the case. *Day v. Cummings*, 19 Vt. 496. An assignment without warranty has the same effect as a release. *Pile v. Benham*, 3 Hayw. (Tenn.) 176.

<sup>102</sup> *Buie v. Wooten*, 7 Jones Law, (N. Car.) 441. The incompetency of a grantor of land, with covenants of warranty, may be removed by a release from those who, at the time the witness is offered, are alone capable of suing for a breach of such covenants. *Clark v. Johnson* 5 Day (Conn.) 373.

<sup>103</sup> *Carroll v. McWhorter*, 2 Bay (S. Car.) 463; *Luyten v. Haygood*, 2 Bay (S. Car.) 177. See, also, *Varner v. Goldsby*, 22 Ga. 302. If a witness, incompetent on the score of interest, releases his interest, it is for the jury to judge of the degree of credit to which he is entitled. *Kinloch v. Palmer*, 1 Mill (S. Car.) Const. 216.

<sup>104</sup> *Ingram v. Smith*, 1 Head. (Tenn.) 411; *Richardson v. Carey*, 2 Rand. (Va.) 87; *Murray v. House*, 11 Johns. (N. Y.) 464; *Wise v. Patterson*, 3 Greene (Iowa) 471; *McCurdy v. Terry*, 33 Ga. 49; *Walker v. Ferrin*, 4 Vt. 523; *Crooker v. Jewell*, 29 Me. 527. It is held that one joint holder of an interest may release as to all. *Hockless v. Mitchell*, 4 Esp. 86; *Haley v. Godfrey*, 16 Me. 305; *Whitamore v. Water-*

*house*, 4 Car. & P. 383; *Bulkley v. Dayton*, 14 Johns. (N. Y.) 387; *Perlberg v. Gorham*, 10 Cal. 120. But not if the parties to the record who are interested in the witness' testimony have several interests. *Betts v. Jones*, 9 Car. & P. 199. It has been held in Louisiana one of several plaintiffs cannot release his co-plaintiffs from the payment of costs, in order to make them disinterested witnesses. *Roselius v. Barrelli*, 16 La. Ann. 386. Where a common right of fishery is in all the inhabitants of a place, a release, by one of them, of all his interest in the right, to any person whatever, is inoperative (such interest being a personal right not assignable), and does not render him a competent witness to prove such common right. *Jacobson v. Fountain*, 2 Johns. (N. Y.) 170. A deputy sheriff delivered attached goods to a third person, who gave him an accountable receipt therefor, and then delivered them to the defendant in the action, but it was held that his incompetency as a witness for the defendant was not removed by a release from the high sheriff. *Pollard v. Graves*, 23 Pick. (Mass.) 86.

<sup>105</sup> *Baillie v. Hole*, 1 Moo. & M. 289; *Dudley v. Love*, 35 Ga. 148; *Bailey v. Bailey*, 1 Bing. 92; *Brewer v. Murray*, 7 Blackf. (Ind.) 567;

actions in favor of, and against the witness, in regard to the matter in which he is called to testify, are so released as to relieve the witness of all possibility of liability and interest in the event of the suit, the release is sufficient to render the witness competent,<sup>106</sup> so far as the question of interest is concerned.

**§ 743. Release of interest—When made.**—Good practice requires that the release should be made before the trial.<sup>107</sup> But it has been permitted to be made after the trial has commenced,<sup>108</sup> and even after

Irwin v. Caryell, 8 Johns. (N. Y.) 407. See the following which hold the contrary: Webb v. Kelly, 37 Ala. 333; Drinkwater v. Holliday, 11 Ala. 134; Pomeroy v. Avery, 9 Paige (N. Y.) 591; Spann v. Brown, Riley (S. Car.) 177. It is a discretionary matter with the court, in some cases, to allow another party to be substituted for the interested one, so that the interested one may testify as in the case of a bondsman or a *prochein ami*. Helms v. Fraciscus, 2 Bland (Md.) 544; Burks v. Shain, 2 Bibb. (Ky.) 341; Matthews v. Coalter, 9 Mo. 705. See Klockenbaum v. Pierson, 22 Cal. 160; Gray v. Morey, 26 Ill. 409; Charlesworth v. Williams, 16 Ill. 338; Otey v. Hoyt, 3 Jones (N. Car.) 407; Pomeroy v. Avery, 9 Paige (N. Y.) 591. But a court cannot compel a release where to do so would destroy a right vested in the party, for vested rights cannot be taken away in that mode. Thus, "courts have no authority to discharge a surety on an injunction or appeal bond and substitute another, so as to make the former a competent witness. Such a power may be very convenient, but it impairs the obligation of contracts, and violates the organic law." Artz v. Grove, 21 Md. 456.

<sup>106</sup> Williams v. Mitchell, 30 Ala.

299; Bond v. Carter, 14 Ga. 697; Bank v. Nantucket, &c. Co. 2 Story, 16; Cartwright v. Williams, 2 Stark, 301; Scott v. Lifford, 1 Campb. 246, 249; Farwell v. Harris, 12 La. Ann. 50; Varner v. Goldsby, 22 Ga. 302; Waggener v. Dyer, 11 Leigh (Va.) 384; Pile v. Benham, 3 Hayw. (Tenn.) 176; Hogshead v. Baylor, 16 Gratt. (Va.) 99; Wills v. Judd, 26 Vt. 617. A release must be in writing. Richardson v. Bartley, 2 B. Mon. (Ky.) 328. In one case where the witness had been released, but in response to the question whether or not he expected to pay the judgment and expenses, if the plaintiff recovered, said, "I certainly do," the witness was held incompetent notwithstanding the release. Skillenger v. Bott, 1 Conn. 147.

<sup>107</sup> Moore v. Rich, 12 Vt. 563; Orphans' Court v. Woodburn, 7 W. & S. (Pa.) 162; Fletcher v. Cole, 26 Vt. 170. "The usual and proper course is for the release to be tendered to the witness before he is sworn in the cause; and when the testimony is taken under commission, to insert it in the return, with the commissioner's certificate that it was so tendered." Delee v. Sandel, 12 La. Ann. 208.

<sup>108</sup> Barnes v. Ball, 1 Mass. 73; Pegg v. Warford, 7 Md. 582; Taylor

a witness has been examined in chief, provided that he is then re-examined.<sup>109</sup> The party called to testify should be informed before taking the witness chair that his interest has been released.<sup>110</sup>

§ 744. **Some interests cannot be released.**—As a general rule, all objections to competency on account of interest may be removed by a proper and complete release.<sup>111</sup> Yet there are certain interests, because of their peculiar character and nature, that cannot be released.<sup>112</sup> Examples will be found in the cases cited, and some of the most important are specified in the note.

v. Whiting, 2 B. Mon. (Ky.) 268. A release of interest by a party, not made until after his deposition has been taken, may, however, detract greatly from the credibility of the evidence. *Steele v. Payne*, 2 A. K. Marsh. (Ky.) 187.

<sup>109</sup> *Tallman v. Dutcher*, 7 Wend. (N. Y.) 180; *National, &c. Co. v. Crane*, 16 Md. 260. As to the weight of such testimony, see generally: *Wynn v. Williams*, Minor (Ala.) 136; *Steele v. Payne*, 2 A. K. Marsh. (Ky.) 187; *Ten Eyck v. Bill*, 5 Wend. (N. Y.) 55. *Kimball v. Gearhart*, 12 Cal. 27; *Jones v. Raine*, 4 Rand. (Va.) 386.

<sup>110</sup> *Fitzpatrick v. Baker*, 31 Ala. 563; *State v. Mosely*, 7 Coldw. (Tenn.) 576; *Seymour v. Strong*, 4 Hill, (N. Y.) 255; *Gray v. Brown*, 22 Ala. 262. See generally as to the witness' assent to being released: *Porter v. Munger*, 22 Vt. 191; *Mathews v. Marchant*, 3 Dev. & B. (N. Car.) 40; *McCurdy v. Terry*, 33 Ga. 49; *Smith v. Bell*, 35 Ga. 238. The release need not be delivered personally; a deposit of it in court is sufficient. *Doe v. Casiday*, 9 Ind. 63; *Brown v. Brown*, 5 Ala. 508. Compare *Cooper v. Granberry*, 33 Miss. 117; *Stevenson v. Mudgett*, 10 N. H. 338; *Evans v. Pigg*, 28 Tex. 586, 596. When a

release is proved to have been made before a deposition was taken, and that the witness knew it, the fact that the release is on file among the papers in the case is prima facie evidence of its delivery. *Kyle v. Bostick*, 10 Ala. 589. An acknowledgment by a witness, in his deposition, that a release had been delivered to him before he was sworn, does not remove a proper objection to his competency. *Myre v. Ludwig*, 1 Pa. St. 47. Incompetency by reason of interest cannot be removed by releasing the interest, so as to make the party a competent witness, unless such release is authorized by the proposed witness. *McCurdy v. Terry*, 33 Ga. 49.

<sup>111</sup> *Carter v. Trueman*, 7 Pa. St. 315; *Ward v. Lee*, 13 Wend. (N. Y.) 41; *Smith v. Allen*, 18 Johns. (N. Y.) 245; *Bagley v. Osborn*, 2 Wend. (N. Y.) 527; *Linsley v. Lovely*, 26 Vt. 123; *Lefferts v. De Mott*, 21 Wend. (N. Y.) 136; *Duke v. Pownall*, 1 Moo. & M. 430.

<sup>112</sup> *Kennedy v. Conn*, 3 B. Mon. (Ky.) 321; *Jacobson v. Fountain*, 2 Johns. (N. Y.) 170; *Abby v. Goodrich*, 3 Day (Conn.) 433; *Powell v. Powell*, 7 Ala. 582; *Mawry v. Mason*, 8 Port. (Ala.) 211; *DeArmond v. DeArmond*, 10 Ind. 191; *Wilkinson v. Pittsburg, &c. Co.* 8

§ 745. **Whether release should be under seal.**—Some of the authorities hold that a release, to be valid, must be given under seal.<sup>113</sup> But others hold that such a formality is not necessary.<sup>114</sup>

§ 746. **How release is proved.**—The release should be produced in court, its execution proved, and the court allowed to pass upon its sufficiency.<sup>115</sup> But this is not always required, especially where, for some good reason, the original release cannot be produced.

Pa. St. 398; *Taylor v. Kelly*, 31 Ala. 59; *Neal v. Lamar*, 18 Ga. 746; *Haworth v. Wallace*, 14 Pa. St. 118; *Gould v. Tatum*, 21 Ark. 329; *Pendleton v. Speed*, 2 J. J. Marsh. (Ky.) 508; *Wade v. Lynch*, 21 Md. 534; *Ferriday v. Selser*, 5 Miss. 506; *Little v. Riley*, 43 N. H. 109; *Gould v. Beal*, 26 Tex. 665; *Brown v. Johnson*, 13 Gratt. (Va.) 644. Where two joint executors propound a will for probate, and are parties to the contest, neither can render themselves competent as witnesses, to sustain the will, by renouncing the executorship. *Deslonde v. Darrington*, 29 Ala. 92. A release by one of two partners, who are sued, of all claims against a third partner not sued, will not render such third partner a competent witness for the others. *Bill v. Porter*, 9 Conn. 23. "A person who is beneficially interested under a will at the commencement of a proceeding to test its validity, is substantially a party to the issue, although not so named, and cannot, by a subsequent release, discharge himself from liability for costs, and is not thereby restored to competency as a witness." *Montgomery v. Grant*, 57 Pa. St. 243.

<sup>113</sup> *Smith v. Harris*, 3 Sneed (Tenn.), 553; *Dennett v. Lamson*, 30 Me. 223; *Governor v. Daily*, 14

Ala. 469; *Kennon v. McRea*, 2 Port. (Ala.) 389. A witness incompetent from interest cannot be made competent by parol. *Richardson v. Bartley*, 2 B. Mon. (Ky.) 328. A colorable assignment to make a plaintiff a witness does not divest his interest. And every assignment is deemed colorable until the contrary appears. *Phinney v. Tracey*, 1 Pa. St. 173; *Leiper v. Peirce*, 6 W. & S. (Pa.) 555.

<sup>114</sup> *Boland v. Greenville, &c. R. Co.* 12 Rich. (S. Car.) 368; *Dunham v. Branch*, 5 Cush. (Mass.) 558.

<sup>115</sup> *Hobart v. Bartlett*, 17 Me. 429; *Reading v. Metcalf*, Hard. (Ky.) 535; *Southard v. Wilson*, 21 Me. 494. If the release cannot be produced parol evidence as to its contents will be admitted. *Goodrich v. Hanson*, 33 Ill. 498; *Jewet v. Worthington*, 1 Root (Conn.) 226. See *Gray v. Morey*, 26 Ill. 409. If the party who objects to the competency of the witness desires to avail himself of the want of sufficient proof of a proper release he must make his objection at the time the proof of the release is offered. *Doe v. Paine*, 4 Hawks. (N. Car.) 64. Where a witness is released, and objection is made to the witness only, but not to the proof of the instrument of release, it has been held that it cannot thereafter be claimed that the re-

§ 747. **Assignment of interest.**—Under the common law rule a person could, in some cases, assign his interest so as to be a witness.<sup>116</sup> But where the witness interested was one of the original parties to a chose in action, he could not, it seems, make himself a competent witness by assignment as to those things which occurred before the assignment.<sup>117</sup> So a mere colorable assignment does not remove the incompetency.<sup>118</sup>

§ 748. **Payment—Disclaimer.**—A witness may pay the amount of the liability resulting from his interest and thus render himself competent.<sup>119</sup> The witness may also, in some cases, disclaim all interest, and then be allowed to give his testimony;<sup>120</sup> but, of course, this rule implies that the disclaimer must be one that the witness has a right to make, and not one made under such circumstances as to be ineffective.

§ 749. **Indemnifying the witness.**—If the witness is fully indemnified against all liability, either by money placed in his hands or by a bond, he may be competent to testify, although interested in the

lease was not legally proved, nor that it was improperly admitted in evidence. *Rhines v. Baird*, 41 Pa. St. 256. The certificates of a notary public to a release is sufficient proof of such release. *Allen v. Lacy*, *Dudley* (Ga.), 81. After a release given to render a witness competent has been executed and ruled sufficient by the court, there is no error in a refusal to allow the introduction of other testimony, showing an interest in the witness existing prior to the release. *White v. Tucker*, 9 Iowa, 100. An objection to the sufficiency of a release to be available on appeal must be taken at the time the release is offered. *Doe v. Paine*, 4 Hawks. (N. Car.) 64; *Downey v. Hicks*, 14 How. (U. S.) 240; *Baxter v. Rodman*, 3 Pick. (Mass.) 435.

<sup>116</sup> *Tobey v. Leonards*, 2 Wall. (U. S.) 423; *Cates v. Wacter*, 2 Hill (S.

Car.) 442; *Beaver v. Beaver*, 23 Pa. St. 167; *Smith v. Bell*, 35 Ga. 238; *Henderson v. Crouse*, 7 Jones (N. Car.) 623; *Willings v. Consequa*, Pet. (C. C.) 301; *Central, &c. R. Co. v. Hines*, 19 Ga. 203; *Black-erby v. Holton*, 5 Dana (Ky.), 520.  
<sup>117</sup> *Lindsley v. Malone*, 23 Pa. St. 24.

<sup>118</sup> *Leiper v. Peirce*, 6 W. & S. (Pa.) 555; *Gates v. Johnson*, 3 Pa. St. 52; *Phinney v. Tracey*, 1 Pa. St. 173; *Cochran v. McTeague*, 8 W. & S. (Pa.) 272; *Jarvis v. Barker*, 3 Vt. 445.

<sup>119</sup> *Williams v. Mitchell*, 30 Ala. 299; *Dearborn v. Dearborn*, 10 N. H. 473. See *Ball v. Bank*, 8 Ala. 590; *Mokelumne, &c. Co. v. Woodbury*, 14 Cal. 265.

<sup>120</sup> *Markham v. Carothers*, 47 Tex. 21; *Jenness v. Berry*, 17 N. H. 549; *Smith v. West*, 103 Ill. 332; *Stub v. Leis*, 7 Watts (Pa.) 43. A defendant who has filed a disclaimer

event of the suit.<sup>121</sup> The indemnity, however, must come from the person to whom the witness would be liable, and not from a third person.<sup>122</sup>

is not thereby released from liability for previous costs, and is not therefore a competent witness for his co-defendant. *Dikes v. Miller*, 24 Tex. 417; *Kirk v. Ewing*, 2 Pa. St. 453.

<sup>121</sup> *Beckley v. Freeman*, 15 Pick. (Mass.) 468; *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Hall v. Baylies*, 15 Pick. (Mass.) 51; *Leverett v.*

*Stegall*, 23 Ga. 257; *Roberts v. Adams*, 9 Me. 9; *Jordan v. Young*, 37 Me. 276; *Lake v. Auburn*, 17 Wend. (N. Y.) 18.

<sup>122</sup> *Molyneaux v. Collier*, 30 Ga. 731; *Paine v. Hussey*, 17 Me. 274; *Josey v. Wilmington, &c. R. Co.* 11 Rich. (S. Car.) 399; *Kennedy v. Evans*, 31 Ill. 258.

## CHAPTER XXXIV.

### MENTAL INCAPACITY.

Sec.	Sec.
750. Meaning of term—The rule—Classification.	760. Idiots—The rule.
751. Insane persons—Competency.	761. Idiots—Why incompetent.
752. Insane persons—How show insanity.	762. Idiots—Differ from insane.
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	770. Infants—Weight of testimony.
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§ 750. **Meaning of term—The rule—Classification.**—A witness who has mental disqualifications is one who has not the capacity to receive, to record, and to recall correct impressions, and to testify intelligently concerning them, or to know right from wrong and understand the meaning of an oath or the danger of punishment if he testifies falsely. The testimony of a witness who has such mental disqualifications as to make him unable to receive and communicate correct impressions intelligently should be excluded, and so, as a general rule, if he is so wanting in understanding that he has no knowledge of right and wrong and the danger of punishment if he testifies



falsely. Persons having mental disqualifications may be classed as follows: Idiots, infants of tender age, intoxicated persons and insane persons.

§ 751. **Insane persons—Competency.**—Those who, by reason of permanent insanity, are incapable of receiving and communicating correct impressions, or of understanding right and wrong, and the obligation of an oath, are incompetent.<sup>1</sup> There is now no hard and fast rule making an insane person incompetent, as there seemed to be formerly, in nearly all cases, except that of a lunatic during a lucid interval, but much is left to the discretion of the court, to be exercised according to the nature, degree and effect of the insanity and the circumstances of the particular case.

§ 752. **Insane persons—How show insanity.**—The opposite party must cause the incompetency on the ground of insanity to appear. This may be shown by a voir dire examination,<sup>2</sup> or by outside testimony, or during the course of the witness's own testimony, in which case he may be excluded, and such testimony as he has already given should then be struck out.<sup>3</sup>

§ 753. **Insane persons—Court decides whether or not.**—The court decides, as a preliminary question, as to whether the witness is so insane as to be incompetent.<sup>4</sup> It has been held, however, that the trial judge might permit him to testify, and leave it to the jury to reject the testimony if the witness is deemed not to be credible.<sup>5</sup>

§ 754. **Insane persons—The test.**—The test of competency most often adopted is, whether the witness has such understanding as to enable him to retain in memory the events of which he has been wit-

<sup>1</sup> *Evans v. Hettich*, 7 Wheat. (U. S.) 453; *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; *Holcomb v. Holcomb*, 28 Conn. 179; *Armstrong v. Timmons*, 3 Harr. (Del.) 343; *Lopez v. State*, 30 Tex. App. 487, 28 Am. St. 935, 17 S. W. 1058; *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72; *Cannady v. Lynch*, 27 Minn. 436. But see *Sarbach v. Jones* 20 Kans. 497, 500; *Campbell v. State*, 23 Ala. 44, 74.

<sup>2</sup> *District of Columbia v. Armes*, 107 U. S. 521, 2 Sup. Ct. 840;

*Lopez v. State*, 30 Tex. App. 487, 28 Am. St. 935, 17 N. W. 1058.

<sup>3</sup> *Regina v. Whitehead*, L. R. 1 C. C. R. 33. See, also, *Hoyt v. Adey*, 3 Lans. (N. Y.) 173 (inquisition of lunacy); *Armstrong v. Timmons*, 3 Harr. (Del.) 342.

<sup>4</sup> *Holcomb v. Holcomb*, 28 Conn. 177; *Cannady v. Lynch*, 27 Minn. 435; *Rex v. Hill*, 20 Law J.; M. C. 222, m., 2 Den. C. C. 254.

<sup>5</sup> *Mead v. Harris*, 101 Mich. 585, 60 N. W. 284; *Bowdle v. Railroad Co.* 103 Mich. 272, 61 N. W. 521.

ness, and to give him a knowledge of right and wrong.<sup>6</sup> "All persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; therefore idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded. A witness is not excluded by this rule merely because he is a lunatic. That is not enough, per se, to exclude him; but he must, at the time of his examination, be so under the influence of his malady as to be deprived of that 'share of understanding' which is necessary to enable him to retain in memory the events of which he has been witness and gives him a knowledge of right and wrong. If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of testimony, the credit to be attached to it, is left to the jury."<sup>7</sup>

**§ 755. Insane persons — Lucid periods.**—A lunatic is competent during a lucid period.<sup>8</sup> This was held, even when the strict rule prevailed. Under the present rule an insane person may not only be competent during a lucid interval, but his unsoundness of mind may be such as not to render him incompetent, on that ground alone, at any time.<sup>9</sup>

**§ 756. Insane persons—Insane at time of transaction or event.**—The fact that a witness, sane while upon the witness stand, was insane at the time the events transpired concerning which he is giving his testimony, generally goes to his credibility, and not to his competency.<sup>10</sup> But if the delusion existed at the time of the transaction, and affected his power to observe them correctly, it has been held that

<sup>6</sup> *Holcomb v. Holcomb*, 28 Conn. 177; *Walker v. State*, 97 Ala. 85, 12 So. 83; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865, 18 Am. R. 711.

<sup>7</sup> *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865, 18 Am. R. 711.

<sup>8</sup> *Holcomb v. Holcomb*, 28 Conn. 177; *Cannody v. Lynch*, 27 Minn. 435; *Campbell v. State*, 23 Ala. 44; *Evans v. Hettich*, 7 Wheat. (U. S.)

453, 470; *Kendall v. May*, 10 Allen (Mass.) 59.

<sup>9</sup> As to monomaniacs, see *Reg. v. Hill*, 5 Cox C. C. 259; *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. 840. But compare *Waring v. Waring*, 12 Jur. 947. See, also, post § 758.

<sup>10</sup> *Holcomb v. Holcomb*, 28 Conn. 177.

he should be excluded.<sup>11</sup> It has also been held that one who has been adjudged restored to his reason and understanding may give testimony as to transactions occurring while he was under guardianship as an adjudicated insane person.<sup>12</sup> And an insane person, who is capable of understanding the obligation of the oath, and of giving a correct narrative of the particulars in the cause, is a competent witness.<sup>13</sup>

**§ 757. Insane persons—Proof—Duty of going forward and burden of proof.**—The fact of insanity must, in the first instance, be shown by the party who objects to his testifying because incompetent.<sup>14</sup> But the burden of proof as to restoration to sanity generally rests upon the party who calls the witness to the stand;<sup>15</sup> for permanent insanity is presumed to continue as a mental state, when it has once existed, until the contrary is proved.<sup>16</sup>

**§ 758. Insane persons—Rule as to monomaniacs.**—Whether a person suffering with monomania or unsoundness of mind upon one particular subject (not a part of the matter in issue) is incompetent is a question upon which there have been few decisions. The better rule would seem to be that the question of his competency is one for the trial judge to decide, and, if deemed competent, then the jury must pass upon his credibility.<sup>17</sup>

**§ 759. Idiots—Meaning of term.**—An idiot is a person who has

<sup>11</sup> *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72; *Holcomb v. Holcomb*, 20 Conn. 179. But see *Sarbach v. Jones*, 20 Kans. 497, 500; *Campbell v. State*, 23 Ala. 74.

<sup>12</sup> *Sarbach v. Jones*, 20 Kans. 497. See *Endel v. Walls*, 16 Fla. 786.

<sup>13</sup> *Mayor v. Caldwell*, 81 Ga. 76, 7 S. E. 99; *Kendall v. May*, 10 Allen (Mass.) 59; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865, 18 Am. R. 711. See articles: 40 Cent. Law Jour. 133, note in 28 Am. St. 935.

<sup>14</sup> *Perine v. Grand Lodge*, 48 Minn. 82; *Fknight v. Jackson*, 36 S. Car. 10, 14 S. E. 982; *Mayor v.*

*Caldwell*, 81 Ga. 78, 7 S. E. 99; *State v. Holloway*, 8 Blackf. (Ind.) 45.

<sup>15</sup> *Hoyt v. Adees*, 3 Lans. (N. Y.) 173; *Clements v. McGinn*, 130 Cal. 370, 33 Pac. 920; *Pittsburg, etc. R. Co. v. Thompson*, 82 Fed. 720; *Spittle v. Waltin*, L. R. 11 Eq. 420; *Armstrong v. Timmons*, 3 Harr. (Del.) 342.

<sup>16</sup> See cases in note 15 supra.

<sup>17</sup> *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865; *Holcomb v. Holcomb*, 28 Conn. 177. See *Reg. v. Hill*, 15 Jur. 470, 5 Eng. L. & Eq. 547; *Waring v. Waring*, 12 Jur. 947; *Ray Med. Jur. sec. 304.*

been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any.<sup>18</sup> "Idiocy is that condition in which the human creature has never had, from birth, the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of all mind. Hence, this state of fatuity can rarely or ever be mistaken by any, the most superficial, observer. The medical profession seem to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity."<sup>19</sup>

**§ 760. Idiots—The rule.**—An idiot is always incompetent as a witness, and his testimony should never be received.<sup>20</sup> He has no lucid intervals, and at no time is fully possessed of understanding. This was the old rule, and the rule is still the same when the term idiot is used in the sense indicated; but it is sometimes used in a somewhat different sense.<sup>21</sup>

**§ 761. Idiots—Why incompetent.**—One, to testify, must have understanding. It would clearly be useless to administer an oath to one in such condition, since he would be incapable of comprehending it or the consequences of its violations, and hence, this essential requisite lacking, the person would be incompetent.<sup>22</sup>

**§ 762. Idiots—Differ from insane.**—An idiot is one who has always been and always will be non compos mentis. Unlike an insane person, he has no lucid periods, and so, under no circumstances, it seems, can he become a competent witness.<sup>23</sup>

**§ 763. Idiots—Proof of idiocy.**—It has been said that proof that one introduced as a witness is an idiot must be other than by a pre-

<sup>18</sup> Black Law Dict.; *Battle v. State*, 105 Ga. 703, 708, 32 S. E. 160; *Odell v. Buck*, 21 Wend. (N. Y.) 143. See *Somers v. Pumphrey*, 24 Ind. 231, 244; *Blanchard v. Nestle*, 3 Den. (N. Y.) 37, 41; *Hiett v. Shull*, 36 W. Va. 565, 15 S. E. 146.

<sup>19</sup> *Owing's Case*, 1 Bland Ch. (Md.) 372.

<sup>20</sup> *Gebhart v. Shindle*, 15 Serg. &

R. (Pa.) 235; *Phebe v. Prince*, (Walk.) Miss, 131; *Kilburn v. Mullen*, 22 Ia. 498.

<sup>21</sup> See *Wharton Cr. Law*, § 752.

<sup>22</sup> *Kilburn v. Mullen*, 22 Iowa, 498; *Fuller v. Fuller*, 17 Cal. 605; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865.

<sup>23</sup> *Kilburn v. Mullen*, 22 Iowa, 498.

liminary examination of the witness, and it has been held that, even granting that the court have discretion by which they may permit a preliminary examination in such case, still it is not error for the court to refuse to permit it.<sup>24</sup> This doctrine, however, seems questionable. It is apparently in conflict with authorities already cited, and, while the refusal to allow such an examination may not always be available error, we do not see why it may not show such a witness to be incompetent as well as in many other cases.

**§ 764. Deaf and dumb persons—Competency.**—In the early history of the law, a deaf and dumb person was presumed an imbecile, and so incompetent as a witness unless shown to be sufficiently intelligent.<sup>25</sup> But deaf and dumb persons are, by the modern doctrine, presumed to be competent.<sup>26</sup> In no jurisdiction in this country are they necessarily presumed to be incompetent. A deaf and dumb person who understands the nature and sanctity of an oath is not incompetent, unless no person can be found who can communicate to him by signs the questions asked, and interpret his answers to the court and jury; or unless he cannot communicate through writing.<sup>27</sup> Even though such witness can write, nevertheless his testimony may be communicated by signs.<sup>28</sup> The trial judge may use his discretion as to the means best suited to obtain the testimony of the witness. The court also determines whether or not the witness has the requisite understanding.

**§ 765. Intoxicated persons—Competency.**—It has been said that a person who is in a state of intoxication at the time he is called upon

<sup>24</sup> *Robinson v. Dana*, 16 Vt. 474.

<sup>25</sup> *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *State v. Weldon*, 39 S. Car. 318, 17 S. E. 688; *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. Law Reg. N. S. 776; *Hale Pl. Cr.* 1, 34; *Rex v. Ruston*, 1 Leach Cr. C. 455; *Morrison v. Lennard*, 3 C. & P. 127.

<sup>26</sup> *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Christmas v. Mitchell*, 3 Ired. Eq. (38 N. Car.) 535; *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187; *Hebert's Succession*, 33 La. Ann. 1099; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Barnett v.*

*Barnett*, 1 Jones Eq. (54 N. Car.) 221; *State v. Weldon*, 39 S. Car. 318; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272.

<sup>27</sup> *People v. McGee*, 1 Den. (N. Y.) 19; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Kirk v. State*, 35 Tex. Cr. App. 224, 37 S. W. 440; *Spaggs v. State*, 108 Ind. 53, 8 N. E. 695; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

<sup>28</sup> *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

to testify is incompetent.<sup>29</sup> He may doubtless be excluded at the time by the court in the exercise of its discretion, but the mere fact of intoxication, unless of such a degree as to affect the capacity of the witness to testify truthfully and correctly, would not, we think, necessarily render him absolutely incompetent. The court may, however, be able to decide from its own view as to whether the witness is in such an intoxicated condition that his testimony should not be received.<sup>30</sup> The fact that a witness was somewhat intoxicated at the time the facts in question transpired is not, in itself, sufficient to exclude his testimony.<sup>31</sup> It may, however, impair his credibility. But, if his statements are corroborated, or his recollection seems to be distinct, he is entitled, it is said, to be considered as a credible witness.<sup>32</sup>

It is no objection to his competency that one has been found to be an habitual drunkard, provided, at the time of giving his testimony, he was not intoxicated.<sup>33</sup> It has been held, also, that intemperate habits cannot be proved in order to impeach the competency of the witness.<sup>34</sup> Confessions of intoxicated persons have also been frequently received.<sup>35</sup>

**§ 766. Infants—Competency.**—A child who is incapable of observing, of recollecting, and of narrating intelligently, is not competent as a witness. A child who is sufficiently mature to receive correct impressions by its senses, and to recollect and narrate them intelligently, is competent,<sup>36</sup> if he also has the ability to comprehend the nature and effect of an oath.<sup>37</sup> It would seem that if he appreciates

<sup>29</sup> *Hartford v. Palmer*, 13 Johns. (N. Y.) 143.

<sup>30</sup> *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.

<sup>31</sup> *Eskridge v. State*, 25 Ala. 33; *People v. Ramirez*, 56 Cal. 533, 536.

<sup>32</sup> *State v. Costello*, 62 Iowa, 404, 17 N. W. 605.

<sup>33</sup> *Gebhart v. Shindle*, 15 S. & R. (Pa.) 235.

<sup>34</sup> *Thayer v. Boyle*, 30 Me. 475.

<sup>35</sup> *State v. Grear*, 28 Minn. 426; *Lester v. State*, 32 Ark. 727, 730; *State v. Felter*, 53 Iowa, 49; *Commonwealth v. Howe*, 9 Gray (Mass.) 112; *Jefferds v. People*, 5 Park Cr. C. 522, 547; *Williams v. State*, 12

*Lea* (Tenn.) 212. As to use of opium see *State v. White*, 10 Wash. 611.

<sup>36</sup> *People v. Bernal*, 10 Cal. 66; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93; *Kelly v. State*, 75 Ala. 22; *State v. Douglas*, 53 Kans. 669, 37 Pac. 172; *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340; *Terr. v. De Gutman*, 8 N. Mex. 92, 42 Pac. 68. See articles: 3 Cent. Law Jour. 491, 36 Cent. Law Jour. 339.

<sup>37</sup> *Johnson v. State*, 61 Ga. 36; *Williams v. State*, 109 Ala. 64, 19 So. 530; *State v. Whittier*, 21 Me. 347; *Commonwealth v. Robinson*, 165 Mass. 426, 43 N. E. 121; *State*

the moral duty to tell the truth,<sup>38</sup> and understands that he may be punished for testifying falsely, he need not fully understand the nature of an oath or have any particular religious belief, especially in jurisdictions in which the oath is optional, and there is some reason for saying that his testimony, if he is sufficiently intelligent to properly observe and narrate the facts, should, in any event, be received for what it is worth; but he ought, at least, to appreciate the gravity of the occasion, and the fear of punishment or some other safeguard ought to be present. The authorities, as it will be observed, are not entirely harmonious.

§ 767. **Infants—Age.**—There is no particular age at which it may be said that a child becomes competent.<sup>39</sup> That is, there is no certain age at which the dividing line between children who are competent and those who are incompetent may be drawn. Intelligence, rather than age, is the determining factor. In some jurisdictions the age of ten is the statutory period of presumption.<sup>40</sup> The testimony of children five and six years of age has been held competent,<sup>41</sup> and it is very

v. Reddington, 7 S. Dak. 368, 64 N. W. 170; Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93; Carter v. State, 63 Ala. 52, 35 Am. R. 4; Lee v. Missouri Pac. R. Co. 67 Kans. 402, 73 Pac. 110 (must not be entirely ignorant of meaning of oath). A boy of fourteen years, who said that he knew it was wrong to speak an untruth, but did not know that he would be punished for false swearing, has been held incompetent. McKelton v. State, 88 Ala. 181. A child who was asked what would become of her if she swore to a lie and answered "The bad man will get me" was considered competent. Logston v. State, 3 Heisk. (Tenn.) 414. One who answered "I shall go to the bad world" was held to be competent. Vincent v. State, 3 Heisk. (Tenn.) 120; and so also one who answered she would get into hell-fire. Draper v. Draper, 69 Ill. 17. See, also, White v. State, 136 Ala. 58, 34 So.

177, where one boy was held competent because he passed a somewhat similar test, and another incompetent because he did not.

<sup>38</sup> See Hughes v. Railroad Co. 65 Mich. 10, 31 N. W. 603.

<sup>39</sup> Hughes v. Railroad Co. 65 Mich. 10, 31 N. W. 603; State v. Denis, 19 La. Ann. 119; Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93; Terr. v. De Gutman, 8 N. Mex. 92. 42 Pac. 68.

<sup>40</sup> Blackwell v. State, 11 Ind. 196; Holmes v. State, 88 Ind. 145.

<sup>41</sup> State v. Juneau, 88 Wis. 180; Wheeler v. United States, 159 U. S. 523; Rex v. Holmes, 2 Fost. & F. 788; Trim v. State (Miss.) 33 So. 718. A boy of six may testify if the court finds him qualified. Buck v. People's St. R. Co. 46 Mo. App. 555. See, also, Reyna v. State (Tex. Cr. App.) 75 S. W. 25 (girl seven years old). A little girl less than four years old who did not understand the nature of an oath was held incompetent in State v. Wilson, 109

common for children eight and nine years of age to give testimony.<sup>42</sup>

The law is stated in one case,<sup>43</sup> in substance, as follows: An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received.

**§ 768. Infants—Court determines competency.**—It is for the trial judge to decide whether or not a certain minor is competent.<sup>44</sup> The examination, it has been held, should be made by the court and not the attorneys,<sup>45</sup> and in a criminal case it is held that the competency

La. 74, 33 So. 85. See, also, *State v. King*, 117 Ia. 484, 91 N. W. 768; *Adams v. State*, 34 Fla. 185; *State v. Prather*, 136 Mo. 20; *State v. Feindel*, 58 Hun (N. Y.) 482; *McGuff v. State*, 88 Ala. 147. In *State v. Blythe*, 58 Pac. 1108 (Utah), a statute of the state is interpreted which excludes "Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." In *Wheeler v. United States*, 159 U. S. 523, a child of five years testified; in *State v. Juneau*, 88 Wis. 180, one of five years and five months, and in *Commonwealth v. Robinson*, 165 Mass. 426, one of five years and nine months. In the last case it was recognized that such a child is not punishable for perjury. Compare *State v. Michael*, 37 W. Va. 565.

<sup>44</sup> *Moore v. State*, 79 Ga. 498; *Jackson v. Gridley*, 18 Johns. (N.

Y.) 98; *Washburn v. People*, 10 Mich. 372; *Blackwell v. State*, 11 Ind. 196; *Givens v. Commonwealth*, 29 Gratt. (Va.) 830, 835; *Draper v. Draper*, 68 Ill. 17; *Commonwealth v. Hutchinson*, 10 Mass. 225; *State v. Levy*, 23 Minn. 104; *McGuff v. State*, 88 Ala. 147, 150.

<sup>45</sup> *King v. Brasier*, Leach (4th ed.) 199.

<sup>46</sup> *Minton v. State*, 99 Ga. 254, 25 S. E. 626; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93; *State v. Jackson*, 9 Ore. 459; *State v. Prather*, 136 Mo. 20, 37 S. W. 805; *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *People v. Walker*, 113 Mich. 367, 71 N. W. 641; *State v. Levy*, 23 Minn. 108; *Freeny v. Freeny*, 80 Md. 406, 31 Atl. 304.

<sup>46</sup> *Hughes v. Detroit, &c. R. R. Co.* 65 Mich. 10. Contra: *Carter v. State*, 63 Ala. 52, 35 Am. R. 4, and note.



should be determined in the presence of the party against whom the infant is called to testify.<sup>46</sup>

§ 769. **Infants—Abuse of discretion by court.**—For a gross abuse of discretion on the part of the trial judge in determining the competency of a child an appellate court will review the decision.<sup>47</sup> In other words, while the question is one for the court, and for the trial court in the first instance, and his determination will not readily be disturbed, yet there are rules of law for determining competency, and when the trial court has determined contrary to them, or the case is a very clear one of abuse of such limited discretion as the trial court has on the subject, its action may be reviewed on appeal.

§ 770. **Infants—Weight of testimony.**—There are often serious objections to testimony of children, as that it may have been prompted by unscrupulous and dishonest parties, and also that too much weight may be given it from the fact that the witness is a child and gets the sympathy of the jury. But in the long run justice is better secured by its admission than by its exclusion. A writer says: "A child will have been taught to say that, if it tells a lie, it will go to the bad place when it dies (which is usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand, in the least degree, what is meant by accuracy of expression. It is hardly possible to cross-examine a child, for the test is too rough for an immature mind. However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene; and the result is that its evidence goes to the jury practically unchecked, and has usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all propor-

<sup>46</sup> *People v. McNair*, 21 Wend. (N. Y.) 608.

<sup>47</sup> *Hawkins v. State*, 27 Tex. App. 273; *Lee v. Missouri Pac. R. Co.* 67 Kans. 402, 73 Pac. 110; *State v. Edwards*, 79 N. Car. 648; *State v. Levy*, 23 Minn. 104, 23 Am. R. 678; *Ridenhour v. Kansas City Cable*

*R. Co.* 102 Mo. 270, 288, 13 S. W. 889, 14 S. W. 760; *Smith v. Commonwealth*, 85 Va. 924, 9 S. E. 148; *Peterson v. State*, 47 Ga. 524; *State v. Severson*, 78 Iowa, 653, 43 N. W. 533; *State v. Ritchie*, 28 La. Ann. 327.

tion to the power of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming of what has passed. The evil, however, is one which the law cannot remedy. It would be a far greater evil to make children incompetent witnesses up to a certain age. The only remedy is that judges should insist to juries more strongly than they generally do on the unsatisfactory nature of the evidence of children, and on the danger of being led by sympathy to trust in it.<sup>48</sup>

§ 771. **Infants—Instruction as to oath.**—In England the judges have continued or postponed the trial in order that a child might be instructed as to the meaning and effect of an oath.<sup>49</sup> In some jurisdictions in this country it is held that a child might be instructed during a recess of the court.<sup>50</sup>

<sup>48</sup> General View of the Criminal Law of England, by J. F. Stephen.

7 Car. & P. 320; *Rex v. Pike*, 3 Car. & P. 598.

<sup>49</sup> *Rex v. White*, 1 Leach Cr. C. 482, note a; *Rex v. Wade*, 1 Moody Cr. C. 86. Contra: *Rex v. Williams*,

<sup>50</sup> *Commonwealth v. Lynes*, 142 Mass. 577, 8 N. E. 408.

## CHAPTER XXXV.

### MORAL INCAPACITY.

Sec.	Sec.
772. Persons not having moral capacity.	782. Accomplices—Witnesses for prosecution.
773. Want of religious belief—Common law rule.	783. Accomplices—Witnesses for defense.
774. Want of religious belief—Object of the oath.	784. Infamy—Meaning of term—The rule.
775. Want of religious belief—The test.	785. Reason of the rule.
776. Want of religious belief—Atheists and infidels.	786. Offenses rendering one infamous.
777. Want of religious belief—How proved.	787. Effect where convicted of other offenses.
778. Want of religious belief—Burden of proof.	788. Some exceptions.
779. Want of religious belief—Rule under modern statutes.	789. How proved.
780. Accomplices—Meaning of term.	790. Effect of judgment of conviction in another state or country.
781. Accomplices—Not necessarily incompetent.	791. Removal of incompetency.
	792. Effect of serving out sentence.
	793. Effect of modern statutes.

§ 772. **Persons not having moral capacity.**—The classes included at common law under the head of those having moral incapacity are: 1. Those having a defect, or want of religious belief, rendering them insensible to the obligation of an oath. 2. Those suffering under the disqualification of having been adjudged guilty of infamy. 3. Accomplices.

§ 773. **Want of religious belief—Common law rule.**—The common law rule was that one who lacked religious belief was incompetent to

testify as a witness, because such an one was considered as insensible to the obligations of an oath.<sup>1</sup> Since the testimony of a witness must be given under the sanctity of an oath, where an oath is required, one who lacks religious belief, and so is insensible to the obligations of an oath, is not a proper party to give testimony. If, however, the witness believes in a Deity, whether the God of the Christians, or of the Jews, or a heathen idol, he may be competent, and, if not a Christian, the oath will be administered to him according to the form in use in his own country.<sup>2</sup> And if he is a Christian, he may be allowed, if he has objections to an oath, to make a solemn religious assertion in such a way as is binding on his conscience.<sup>3</sup>

**§ 774. Want of religious belief—Object of the oath.**—The object of the oath is not to call on God to punish the wrongdoer; but on the witness to remember that he will;<sup>4</sup> for an oath is “an outward pledge, given by a person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God.”<sup>5</sup> There is a sort of religious sanction implied by an oath; that is, there is a fear of Divine punishment in case one tells an untruth after having taken an oath to tell the truth, and this was generally regarded as a great and necessary safeguard at common law. It may be argued, however, that if the element of fear of punishment enters into the sanctity of an oath, it arises from fear of the penalty of perjury. The moral obligation to society, and the natural reverence for the majesty of the law dictate sincerity among men, regardless of creeds.<sup>5\*</sup>

**§ 775. Want of religious belief—The test.**—The test is, whether the witness believes in the existence of a God who will punish him if he swears falsely.<sup>6</sup> In one case<sup>7</sup> it is stated: “If a witness does not

<sup>1</sup> *People v. McGarren*, 17 Wend. (N. Y.) 460; *Central, &c. R. Co. v. Rockafellow*, 17 Ill. 541; *Smith v. Coffin*, 18 Me. 157; *Scott v. Hooper*, 14 Vt. 535; *Norton v. Ladd*, 4 N. H. 444.

<sup>2</sup> *Rapalje Witnesses*, p. 13.

<sup>3</sup> *Vail v. Nickerson*, 6 Mass. 262; *Commonwealth v. Buzzell*, 16 Pick. (Mass.) 153; *Arnold v. Arnold*, 13 Vt. 362; *Odell v. State*, 61 Tenn. 91; *Omichund v. Barker*, 1 Atk. 21, 46.

<sup>4</sup> *Blackburn v. State*, 71 Ala. 319;

*Curtiss v. Strong*, 4 Day (Conn.) 51, 56; *Clinton v. State*, 33 Ohio, 27, 33.

<sup>5</sup> *Tyler Oaths*, c. 3; also Part 3, Section c.

<sup>5\*</sup> See post, § 779.

<sup>6</sup> *Brock v. Milligan*, 10 Ohio, 121, 125; *Arnold v. Arnold*, 13 Vt. 362; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *People v. Matteson*, 2 Cow. (N. Y.) 433, n.

<sup>7</sup> *Arnold v. Arnold*, 13 Vt. 362.

believe in any Supreme Governor of the universe, who will reward virtue and punish vice, there is no mode known to us by which an oath can be made binding upon his conscience. If a man sincerely believe himself to belong to the highest order of intelligence, it may be his misfortune, not his fault, but he cannot be sworn by a greater. If sworn, he must be allowed to swear by himself." It has been held sufficient if one has a sense of accountability to God, and believes that he will punish perjury either in this world or the next, and not necessarily in the next world.<sup>8</sup> That is, it is held to be immaterial whether the witness believes that God will punish him before or after death. Thus the evidence of an Universalist has been received, it not appearing that he did not believe in the avenging of the perjurers in this life.<sup>9</sup>

§ 776. **Want of religious belief—Atheists and infidels.**—Atheists or persons who do not believe in the existence of a God, nor in a future state of rewards and punishments, are not competent<sup>10</sup> at common law. As to infidels, what seems to have been the prevailing rule is stated in an old case<sup>10\*</sup> as follows: "I only give my opinion that such infidels who believe a God, and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this, though a Christian country. And, on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. . . . I do not think that the same credit ought to be given either by court or jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the

<sup>8</sup> *Free v. Buckingham*, 59 N. H. 219; *Tearcy v. Miller*, 57 Iowa, 613, 620; *Noble v. People*, 1 Ill. 54; *Shaw v. Moore*, 4 Jones (N. Car.) 25; *Blair v. Seaver*, 26 Pa. St. 274; *Blocker v. Burness*, 2 Ala. 354; *Bennett v. State*, 1 Swan (Tenn.) 411. Contra: *State v. Cooper*, 2 Overt. (Tenn.) 96, 5 Am. Dec. 656; *Atwood v. Welton*, 7 Conn. 66. See, also, *Jackson v. Gridley*, 18 Johns. (N. Y.) 98.

<sup>9</sup> *Butts v. Swartwood*, 2 Cow. (N. Y.) 431.

<sup>10</sup> *Arnold v. Arnold*, 13 Vt. 363; *Norton v. Ladd*, 4 N. H. 444; *Thurston v. Whitney*, 2 Cush. (Mass.) 104; *Atwood v. Welton*, 7 Conn. 66; *Wakefield v. Ross*, 5 Mason (U. S.) 16; *Smith v. Coffin*, 18 Me. 157; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98.

<sup>10\*</sup> *Omichund v. Barker*, Willes, (Eng.) 538.

truth. The distinction between the competency and credit of a witness is a known distinction, and many witnesses are admitted as competent to whose credit objections may be afterward made. The rule of evidence is that the best evidence must be given that the nature of the thing will admit. The best evidence which can be expected or required, according to the nature of the case, must be received, but if better evidence be offered on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean: Suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end. To come nearer to the present case: Supposing an infidel, who believes a God, and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath (as I think he may), and on the other side, to contradict him, a Christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation."

§ 777. **Want of religious belief—How proved.**—The incompetency of a witness on the ground of disbelief in God may be proved by his declarations on the subject, for the question is as to the state of the mind of the witness.<sup>11</sup> "It has been argued that this mode of proof was not admissible, the general rule of evidence being that a witness shall not be permitted to disqualify himself by declarations not under oath, made out of court, as they might be untruly made for that purpose. But it has been frequently held that this mode of proof is admissible, and is an exception to the general rule, from the necessity of the case: it being deemed unreasonable that the party objecting should be restricted to the testimony of the witness on the voir dire, as the objection supposes he has no regard to the sanction of an oath; and if so, his declarations made under oath are of no more weight than those made seriously when not under oath. But the evidence of such declarations should be received cautiously. Remarks or avowals of belief or disbelief may be made in the heat of argument and for the purpose of discussion, which may be no sure indications of the real

<sup>11</sup> *Anderson v. Maberry*, 2 Heisk. Root (Conn.) 399; *Smith v. Coffin*, (Tenn.) 653; *Beardsly v. Foot*, 2 18 Me. 157.

belief or disbelief of the party. So the witness, after having made such declarations, may have changed his opinions; which, perhaps, could not be proved unless he should be allowed to testify. But, notwithstanding these objections, which have some weight, it is well settled that the avowal of a witness of his religious belief or disbelief may be proved like any other fact."<sup>12</sup> In some jurisdictions it is held to be error, when a witness is objected to as lacking religious belief, to examine him on his *voir dire* when he requests that he be allowed to give proof *aliunde*.<sup>13</sup>

§ 778. **Want of religious belief—Burden of proof.**—When a person is presented as a witness the presumption is that he is competent as having the necessary religious belief. If he is objected to as lacking in this respect, the burden of proof is upon the party objecting to show that he is incompetent in this respect.<sup>14</sup>

§ 779. **Want of religious belief—Rule under modern statutes.**—Many states by statute have abolished all disqualifications for the want of belief in the existence of a God. In Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, Texas, Vermont, Virginia and Wisconsin, and, perhaps, in some other states, the competency of a witness cannot be objected to on the ground of lack of religious belief. In a few states the statutes require a belief in a Supreme Being. But even where statutes provide that no person shall be incompetent to testify because of his religious belief the oath is still generally taken, unless it is also abolished or made optional by the statute.

§ 780. **Accomplices—Meaning of term.**—An accomplice is one who is in some way concerned as a participant in the commission of a crime. This includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before

<sup>12</sup> *Thurston v. Whitney*, 2 Cush. (Mass.) 104.

<sup>13</sup> *Commonwealth v. Burke*, 16 Gray (Mass.) 33; *Odell v. Koppee*, 5 Heisk. (Tenn.) 88. *Contra*: *Harrel v. State*, 1 Head (Tenn.) 125; *Arnd v. Amling*, 53 Md. 192.

<sup>14</sup> *Donnelly v. State*, 26 N. J. L. 463, 601; *Den v. Vancleve*, 5 N. J. L. 731; *Smith v. Coffin*, 18 Me. 157; *Attorney Gen. v. Bradlaugh*, 14 Q. B. Div. 667.

or after the fact,<sup>15</sup> although in its strictest sense the term is applied only to those associated as principals in the commission of the crime.

§ 781. **Accomplices—Not necessarily incompetent.**—At common law an accomplice, if deemed incompetent at all, was considered incompetent more on account of interest in the event of the trial than for any moral disqualifications. His interest being that for information divulged he was to be granted immunity, or his punishment was to be mitigated. Even at common law, however, an accomplice was not generally considered incompetent merely because he was in some sense an accomplice, at least where he was not jointly indicted or tried, for this went to his credibility rather than his competency.<sup>16</sup> If an accomplice were indicted and sentenced, then on the ground of infamy he was considered incompetent.

§ 782. **Accomplices—Witnesses for prosecution.**—The following opinion holding that the state may introduce an accomplice as a competent witness is a true view of the law: "Most of the authors on evidence adopt the view that the testimony is admissible when offered by the state. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice."<sup>17</sup> Mr. Wharton says: 'An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a co-defendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered.'<sup>18</sup> Mr. Greenleaf states the same rule; he says: 'The usual course is to leave out of the indictment those who are to be called as witnesses, but it makes no difference as to the admissibility of an accomplice whether he is indicted or not, if he has not been put on his trial at the same

<sup>15</sup> Black Law Dict.; Bouvier Law Dict. Tit. Accomplices. See discussion as to testimony of accomplices in notes, 86 Am. Dec. 329, 71 Am. Dec. 671, and article 8, Cr. Law Mag. 1.

<sup>16</sup> See 1 Hale P. C. 303, Rockwood's Case, 2 St. Trials, 159, 13 St. Trials, 139; Layer's Case, 16 How. St. Trials, 93; Song's Case, 1 Kel.

17; Johnson v. State, 2 Ind. 652, 655; Vaughan v. State, 57 Ark. 1, 20 S. W. 588.

<sup>17</sup> Hawkins' P. C. Book 2, c. 46, § 90; 1 Hale's P. C. 305; 2 Starkie Ev. 11; Roscoe Cr. Ev. 9th ed. 130, 140; 2 Russell Crimes, 957.

<sup>18</sup> Citing Wharton Cr. Ev. (8th ed.) § 439.



time with his companions in guilt.<sup>19</sup> In the light of these authorities, and this legislation of congress, there is less difficulty in disposing of this question. If interest, and being a party to the record, do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the co-defendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment. The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage, and there is no such basis.<sup>20</sup>

§ 783. **Accomplices—Witnesses for defense.**—As to whether or not an accomplice may be a competent witness for the defence, it has been held that where he is separately indicted he may be competent, or if the evidence against him is meager, and the court directs an acquittal, or a nolle prosequi is entered by the prosecutor with the consent of the court, he may then be permitted to testify.<sup>21</sup> In some jurisdictions, however, a contrary view is taken.<sup>22</sup>

<sup>19</sup> Citing 1 Greenleaf Ev. § 379.

<sup>20</sup> *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60. See, also, *State v. Reed*, 50 La. Ann. 990, 24 So. 131; *State v. Stewart*, 142 Mo. 412, 44 S. W. 240; *Lindsay v. People*, 63 N. Y. 143; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *United States v. Ybanez*, 53 Fed. 536.

<sup>21</sup> *People v. Labra*, 5 Cal. 183; *State v. Graham*, 12 Vr. (N. J.) 15; *United States v. Henry*, 4 Wash. C. (U. S.) 428, 429; *State v. Unuble*,

115 Mo. 452, 22 S. W. 378. See, also, *McKenzie v. State*, 24 Ark. 636; *Marshall v. State*, 8 Ind. 498 (competent where jointly indicted but separately tried).

<sup>22</sup> *Collier v. State*, 20 Ark. 36. See, also, *State v. Dunlop*, 65 N. Car. 288; *Ballard v. State*, 31 Fla. 266, 12 So. 865; *Commonwealth v. Marsh*, 10 Pick. (Mass.) 57; *State v. Jones*, 51 Me. 125, 126; *People v. Bill*, 10 Johns. (N. Y.) 95.

§ 784. **Infamy—Meaning of term—The rule.**—Infamy is a qualification of a man's legal status by his conviction of an infamous crime and the consequent loss of honor and credit, which, at common law, rendered him incompetent as a witness, and by statute in some jurisdictions entails other disabilities.<sup>23</sup> One who had been convicted of an infamous crime was by the common law considered incompetent to testify.<sup>24</sup> It is essential that there should be a judgment of conviction to make a person infamous. He must have been actually convicted and adjudged guilty.<sup>25</sup> And nothing short of a final judgment on the conviction will suffice.<sup>26</sup> So confession of a crime, or having a reputation of being immoral, does not disqualify one under this rule.<sup>27</sup> In fact, any proceeding or confession, not shown to have been followed by judgment and sentence, does not disqualify, since in such case a motion in arrest of judgment, or one setting aside the verdict, might be granted.<sup>28</sup>

§ 785. **Reason of the rule.**—Such persons were deemed insensible to the obligation of an oath, and so not worthy of credit.<sup>29</sup> This rule was also considered as a part of the punishment, or rather an incident to the punishment, for such crimes.

§ 786. **Offenses rendering one infamous.**—Some of the offenses

<sup>23</sup> Black Law Dict.

<sup>24</sup> Glenn v. Clore, 42 Ind. 62; Commonwealth v. Knapp, 9 Pick. (Mass.) 495; Dickinson v. Dustin, 21 Mich. 561; Commonwealth v. Gorham, 99 Mass. 420. See the following articles: Notes 73 Am. Dec. 775, 33 Am. R. 639.

<sup>25</sup> Blaufus v. People, 69 N. Y. 107; Cushman v. Loker, 2 Mass. 106; Jones v. State, 32 Tex. Cr. App. 135; State v. Valentine, 7 Ired. (N. Car.) 225.

<sup>26</sup> United States v. Dickinson, 2 McLean (U. S.) 325; Brown v. Commonwealth, 86 Va. 935; Boyd v. State, 94 Tenn. 505, 508; Jackson v. Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; Skinner v. Perot, 1 Ashm. (Pa.) 57; Dawley v. State,

4 Ind. 128; Bishop v. State, 41 Fla. 522, 26 So. 703.

<sup>27</sup> State v. Randolph, 24 Conn. 363; Smithwick v. Evans, 24 Ga. 461; Fay v. Harlan, 128 Mass. 244; Craft v. State, 3 Kans. 450.

<sup>28</sup> Fay v. Harlan, 128 Mass. 244.

<sup>29</sup> A verdict was set aside where a felon over objection testified that he knew nothing of a crime, and was asleep at the time when it was supposed to have been committed. State v. Mullen, 33 La. Ann. 159.

The admission of one convicted of a felony that he wrote a particular instrument, is not competent to qualify the instrument as a standard in order to prove handwriting. Long v. State, 10 Tex. App. 186.

which made one infamous were: grand and petit larceny,<sup>30</sup> burglary,<sup>31</sup> receiving stolen goods, forgery, perjury and subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, conspiracy to defraud creditors<sup>32</sup> and barratry.

**§ 787. Effect where convicted of other offenses.**—There are numerous offenses which involve both falsehood and fraud, and are punished to the same extent as infamous crimes, yet are not such, and the offenders are considered competent witnesses.<sup>33</sup> Some of these offenses are: adultery, embezzlement by a public officer, dealing faro, keeping a bawdy-house, unlawfully cutting timber, and violating a city ordinance.<sup>34</sup> There is some conflict among the authorities, and it is difficult to determine just what crimes were considered as infamous. It may be said, however, infamy is determined by the character of the crime, and not by the nature of the punishment.<sup>35</sup>

**§ 788. Some exceptions.**—Where a person convicted of an infamous crime is a party to the controversy, he may make any affidavit necessary for defending himself, or for relief against an irregular judgment.<sup>36</sup> The law made this distinction mainly because of the necessity of the case, in order that he might not be remediless.

**§ 789. How proved.**—Since nothing short of a recorded conviction disqualifies one under this head, the fact must be proved by the record of his conviction, or, where permissible, by an authentication of the same.<sup>37</sup> So, if objection is made, the witness himself cannot be

<sup>30</sup> Taylor v. State, 62 Ala. 164; Commonwealth v. Keith, 8 Met. (Mass.) 531; James v. Bostwick, 1 Wright (Ohio) 142.

<sup>31</sup> People v. Paek, 41 N. Y. 21; Taylor v. State, 62 Ala. 164.

<sup>32</sup> United States v. Porter, 2 Cranch (U. S.) 60.

<sup>33</sup> Clarke v. Hall, 2 Harr. & M. (Md.) 378; Schuylkill v. Copley, 67 Pa. St. 386; United States v. Brockins, 3 Wash. (U. S.) 99.

<sup>34</sup> Little v. Gibson, 39 N. H. 505; Schuylkill v. Copley, 67 Pa. St. 386.

<sup>35</sup> United States v. Yates, 6 Fed. 861; ex parte Wilson, 114 U. S. 417; People v. Whipple, 9 Cow. (N. Y.)

708; Schuylkill County v. Copley, 67 Pa. St. 386, 390, 5 Am. R. 441.

<sup>36</sup> Skinner v. Perot, 1 Ashm. (Pa.) 57; Ritter v. Stutts, 8 Ired. Eq. (N. Car.) 240; Donohue v. People, 56 N. Y. 208. The handwriting of a felon, who was a subscribing witness before his conviction, was proved as though he were dead. Jones v. Mason, 2 Str. 833.

<sup>37</sup> Hilts v. Colvin, 14 Johns. (N. Y.) 182; Commonwealth v. Green, 17 Mass. 515; Perez v. State, 8 Tex. App. 610; Boyd v. State, 94 Tenn. 505, 512; United States v. Biebusch, 1 Fed. 213, 1 McCrary, 42; State v. Payne, 6 Wash. 563, 568; Barthol-

examined in order to prove this fact. The record is the only proof that is sufficient. However, it has been held that the right to have the record produced may be waived.<sup>38</sup>

**§ 790. Effect of judgment of conviction in another state or country.**—In a majority of the jurisdictions in this country it is held that a judgment of conviction in another state or country ought not to be admitted on the question of the competency of the witness.<sup>39</sup> But it might be shown, in a proper case, to affect his credibility. In some jurisdictions, however, it has been held that such a judgment of conviction will disqualify<sup>40</sup> and render the witness incompetent.

**§ 791. Removal of incompetency.**—One suffering under the disability of infamy may become a competent witness by a pardon or by a reversal of the judgment.<sup>41</sup> To prove the pardon, the charter of pardon, under the great seal of the state, must be introduced.<sup>42</sup> And the reversal of the judgment must generally be shown in the same manner as the judgment itself; that is, by the record, or, in a proper case, by an authenticated or duly exemplified copy. It is also held that a pardon granted after the prisoner had served his term takes away all such disqualifications as a witness.<sup>43</sup> But there may be proof of the conviction to affect the credit of the witness even after a pardon.<sup>44</sup>

omew v. People, 104 Ill. 601, 44 Am. R. 97.

<sup>38</sup> Batson v. State, 36 Tex. Cr. App. 606; White v. State, 33 Tex. Cr. App. 177.

<sup>39</sup> Uhl v. Commonwealth, 6 Gratt. (Va.) 706; Sims v. Sims, 75 N. Y. 466; Commonwealth v. Green, 17 Mass. 515; National Trust Co. v. Gleason, 77 N. Y. 400; Campbell v. State, 23 Ala. 44; Logan v. United States, 144 U. S. 263, 303.

<sup>40</sup> State v. Candler, 3 Hawks (N. Car.) 393; State v. Foley, 15 Nev. 64, 37 Am. R. 458; Chase v. Blodgett, 10 N. H. 22, 24.

<sup>41</sup> Yarborough v. State, 41 Ala. 405; Boyd v. United States, 142 U. S. 453; Klein v. Dinkgrave, 4 La. Ann. 540; Werner v. State, 44 Ark.

122; Baum v. Clause, 5 Hill (N. Y.) 196; United States v. Rutherford, 2 Cranch C. C. 528. But see Foreman v. Baldwin, 24 Ill. 298; Houghaling v. Kelderhouse, 1 Park. Cv. (N. Y.) 241; Rex v. Ford, 2 Salk. 690.

<sup>42</sup> Cooper v. State, 7 Tex. App. 194; State v. Blaisdell, 33 N. H. 388.

<sup>43</sup> Logan v. United States, 144 U. S. 303, 12 Sup. Ct. 617; Hunnicutt v. State, 18 Tex. App. 498, 51 Am. R. 330; State v. Blaisdell, 33 N. H. 388; State v. Dodson, 16 S. Car. 453.

<sup>44</sup> Werner v. State, 44 Ark. 122; Curtis v. Cochran, 50 N. H. 242; Bennett v. State, 24 Tex. App. 73, 5 Am. St. 875.

§ 792. **Effect of serving out sentence.**—If one at common law served out his sentence or suffered the punishment for his offense, it had no effect in removing infamy or making one competent as a witness.<sup>45</sup> Under some of the modern statutes there is a conflict whether, where one has served his sentence, the statute restores him to competency.<sup>46</sup>

§ 793. **Effect of modern statutes.**—Statutes in most of the states today have removed this disqualification. The following jurisdictions have in this way abolished it: California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Vermont, Virginia, and Wisconsin,<sup>47</sup> and, perhaps, a few others. The following states make an exception in the case of one convicted of perjury, but abolish the disability as to all other crimes: Florida, Maryland, Mississippi and South Carolina. Although the statute removes the incompetency, nevertheless the conviction of an infamous crime may be proved in order to affect the credit of the witness.<sup>48</sup>

<sup>45</sup> State v. Benoit, 16 La. Ann. 273.

<sup>46</sup> See State v. Williams, 14 W. Va. 581, holding that he is restored. Contra: United States v. Brown; 4 Cranch C. C. 607.

<sup>47</sup> In Arkansas witness becomes competent if parties consent.

<sup>48</sup> Bartholomew v. People, 104 Ill.

601, 44 Am. R. 97; State v. Harston, 63 N. Car. 294; Territory v. Hyde, 8 Okla. 59, 56 Pac. 851; Sutton v. Fox, 55 Wis. 531, 42 Am. R. 744; State v. Watson, 65 Me. 74; Commonwealth v. Gorham, 99 Mass. 420; State v. Loehr, 93 Mo. 103.

## CHAPTER XXXVI.

### SEPARATION OF WITNESSES.

Sec.	Sec.
794. Meaning of term.	799. After court grants request.
795. The rule.	800. Who are excluded.
796. Purpose or object.	801. Who are not excluded.
797. Time of.	802. Effect of disobedience.
798. Judge controls.	

§ 794. **Meaning of term.**—By separation of witnesses is meant the exclusion of witnesses from the court room during the examination, so that but one will be in court at a time. As hereafter shown, however, this does not apply to the parties to the action, nor, perhaps, to a necessary agent in conducting it. The witnesses are ordered to withdraw from the court room to remain until called, or are placed under charge of the sheriff or other officer.<sup>1</sup> The process is variously called “putting under the rule,” “sequestration,” or “separation of witnesses.” The practice is not new, but has existed from the earliest times.<sup>2</sup>

§ 795. **The rule.**—On application to the court by a party the court will, within the limits of sound discretion, order all witnesses to withdraw from the court room except the one under examination.<sup>3</sup> This is the general rule, but it is not without its limitations or exceptions, to which attention is hereinafter directed.

<sup>1</sup> Hey v. Commonwealth, 32 Gratt. (Va.) 946, 34 Am. R. 799.

<sup>2</sup> Thayer Cas. Ev. p. 5.

<sup>3</sup> McLean v. State, 16 Ala. 672; People v. Green, 1 Park Cr. R.

(N. Y.) 11; Errissman v. Errissman, 25 Ill. 119; Johnson v. State, 2 Ind. 652; Commonwealth v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Watts v. Holland, 56 Tex.

§ 796. **Purpose or object.**—The object of examining the witnesses of the opposite party separately is to prevent collusion and concert of testimony among witnesses; in other words, to ward off the possibility of a preconcerted fabrication of testimony. The truth is often better elicited by securing evidence not influenced by the statements of other witnesses or the suggestions that the attorneys may make.

§ 797. **Time of.**—The request for the exclusion or separation of witnesses is usually made and granted immediately before the examination of any witnesses. If duly requested, it seems that the reason of the rule would also require the exclusion of witnesses during the opening argument of counsel.\*

§ 798. **Judge controls.**—The order is a matter of discretion for the court, and by the weight of judicial decision a party is not entitled to it as a matter of strict right,<sup>5</sup> yet it is rarely withheld. It tends to promote justice, and should be granted in all proper cases,<sup>6</sup>

54. Where the court orders witnesses to be separated or withdrawn from the court during the examination, and a list is furnished to the sheriff to enable him to execute the order, witnesses who afterwards attend the court, and who were not present during the examination, may be sworn and testify. But see *Illinois Cent. R. Co. v. Taylor* (Ky.) 70 S. W. 825. *Anonymous*, 1 Hill (S. Car.) 251. It was held a sufficient separation where a witness was allowed to hear the opening of the case, and, being the first witness sworn, was, after his examination, separated from the other witnesses. *State v. McElmurray*, 3 Strobb. (S. Car.) 33.

\* *Rex v. Murphy*, 8 Car. & P. 297.

<sup>5</sup> *McClellan v. State*, 117 Ala. 140, 23 So. 653; *Barnes v. State*, 88 Ala. 204, 16 Am. St. 48; *People v. McCarty*, 117 Cal. 65, 48 Pac. 984; *May v. State*, 94 Ga. 76; *Errissman v. Errissman*, 25 Ill. 119; *Johnson v. State*, 2 Ind. 652; *Parkes v. United States*, 1 Indian Terr. 592, 43 S. W. 858; *Kentucky Lumber Co. v. Abney* (Ky.) 31 S. W.

279; *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *People v. Considine*, 105 Mich. 149, 63 N. W. 196; *Sartorius v. State*, 24 Miss. 602; *State v. Duffey*, 128 Mo. 549; *State v. Fitzsimmons*, 30 Mo. 236; *Chicago, &c. R. Co. v. Kellogg*, 54 Neb. 127, 74 N. W. 403; *Murphey v. State*, 43 Neb. 34; *McLaughlin v. State*, 18 Ohio, 94, 99, 51 Am. Dec. 444; *Powell v. State*, 13 Tex. App. 244; *Benaway v. Conyne*, 3 Pinn. (Wis.) 196; *Hauvey v. State*, 68 Ga. 612; *Rex v. Goodere*, 17 How. St. Tr. 1003, 1015; *Rex v. Cook*, 13 How. St. Tr. 311, 348; *State v. Brookshire*, 2 Ala. 303; *Porter v. State*, 2 Ind. 435; *Sidgreaves v. Myatt*, 22 Ala. 617; *State v. Davis*, 48 Kans. 1; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Purnell v. Purnell*, 89 N. Car. 42; *Johnson v. Clem*, 82 Ky. 84.

<sup>6</sup> *Reg. v. Murphy*, 8 Car. & P. 297; *Ryan v. Couch*, 66 Ala. 244, 248; *Powell v. State*, 13 Tex. App. 244.

and the exclusion of witnesses in the exercise of the court's discretion will only be reviewed on showing that it has been abused.<sup>7</sup> In some states it may be claimed as a right.<sup>8</sup> Usually the witnesses on both sides are excluded when such an order is asked by one of the parties, but it is held that the court may make exceptions as to certain witnesses when making the order.<sup>9</sup>

**§ 799. After court grants request.**—The witnesses are generally requested to withdraw by an order from the court, accompanied, sometimes, with notice that, if they disobey the order, they will not be examined, or will be punished for contempt. Another customary course in such cases is to request the counsel of the parties to name the witnesses summoned by them, and to direct the sheriff or some other officer to keep such witnesses in a separate room until needed. They are also generally directed not to talk with the witnesses who have been examined about what they have testified to.

**§ 800. Who are excluded.**—Those excluded from the court room are in general the witnesses, but not the parties or their counsel. The ordinary witness may be excluded. But it is held that it is not essential that all be excluded, and that the court in its discretion may exclude only a part, and no valid objections can be taken that such exceptions are made.<sup>10</sup>

**§ 801. Who are not excluded.**—A party to the suit cannot be excluded from the court room as a witness, for it is his right to be present during the whole trial.<sup>11</sup> An attorney in the case has the same

<sup>7</sup> *Nelson v. State*, 2 Swan (Tenn.) 237; *Powell v. State*, 13 Tex. App. 244.

<sup>8</sup> *Nelson v. State*, 2 Swan (Tenn.) 237, 257; *Shaw v. State*, 102 Ga. 660, 29 S. E. 477; *State v. Zellers*, 2 Halst. (N. J.) 220; *Southey v. Nash*, 7 Car. & P. 632; *Johnson v. State*, 14 Ga. 55; *Watts v. Holland*, 56 Tex. 54.

<sup>9</sup> *City Bank v. Kent*, 57 Ga. 285; *State v. Whitworth*, 126 Mo. 573, post § 800.

<sup>10</sup> *Webb v. State*, 100 Ala. 47, 52; *Cent. R. Co. v. Phillips*, 91 Ga. 526; *State v. Whitworth*, 126 Mo. 573; *Johnnican v. State* (Tex. Civ. App.)

48 S. W. 181; *Jackson v. Commonwealth*, 96 Va. 107, 30 S. E. 452; *Xenia, &c. Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

<sup>11</sup> *McIntosh v. McIntosh*, 79 Mich. 198, 203, 44 N. W. 592; *Kentucky Lumber Co. v. Abney* (Ky.) 31 S. W. 279; *Chester v. Bower*, 55 Cal. 46; *Ryan v. Couch*, 66 Ala. 244; *French v. Sale*, 63 Miss. 386; *Schneider v. Haas*, 14 Ore. 174, 58 Am. R. 296; *Garman v. State*, 66 Miss. 196; *Bell v. State*, 66 Miss. 192; *State v. Kelly*, 97 N. Car. 404. If on the trial of two persons charged with crime they announce that they will testify as witnesses,



right in this respect as a party to the suit.<sup>12</sup> And it has been held that this exception will be implied although no application to that effect has been made to the court.<sup>13</sup>

It has also been held that the following should not be excluded: one who is a party in interest, though not a party to the record;<sup>14</sup> an agent of the party, when the presence of such agent is necessary, as when the agent has gained so much familiarity with the facts as to make his presence highly essential;<sup>15</sup> an officer during the testimony of another officer;<sup>16</sup> and it is said that expert witnesses, as a rule, are not excluded until they hear the evidence upon the subject concerning which they are to testify.<sup>17</sup> So, also, a witness who is acting as counsel in the case will not be excluded.<sup>18</sup>

§ 802. **Effect of disobedience.**—There is uniformity of opinion in the decided cases that the judge has the power to punish a witness who disobeys his order, for contempt of court. But there is some conflict as to whether or not a witness violating the order of court by remaining in the court room should be permitted to give any testimony. In some jurisdictions it is held that it is in the discretion of the judge whether or not the witness disobeying shall be examined. Yet in those jurisdictions the judge seldom exercises his right by excluding the testimony.<sup>19</sup> In other jurisdictions it is held that, where the party

each for himself, neither can be placed under the rule and excluded from the court room during the examination of the other. *Richards v. State* 91 Tenn. 723, 30 Am. St. 907.

<sup>12</sup> *State v. Ward*, 61 Vt. 153, 179, 17 Atl. 483; *Everett v. Lowdham*, 5 C. & P. 91; *Powell v. State*, 13 Tex. App. 244.

<sup>13</sup> *Gregg v. State*, 3 W. Va. 705; *Powell v. State*, 13 Tex. App. 244.

<sup>14</sup> *Larne v. Russell*, 26 Ind. 386; *Ryan v. Couch*, 66 Ala. 244; *Shew v. Hews*, 126 Ind. 474, 26 N. E. 483; *Cottrell v. Cottrell*, 81 Ind. 87 (a guardian who is a party in his representative capacity); *Chester v. Bower*, 55 Cal. 46.

<sup>15</sup> *Ryan v. Couch*, 66 Ala. 244; *Betts v. State*, 66 Ga. 508; *Indianapolis Cabinet Co. v. Herrmann*, 7

Ind. App. 462. See, also, *Xenia, & Co. v. Macy*, 147 Ind. 568, 577, 47 N. E. 147.

<sup>16</sup> *People v. Machen*, 101 Mich. 400, 59 N. W. 664.

<sup>17</sup> *Johnson v. State*, 10 Tex. App. 571. But see *Vance v. State*, 56 Ark. 402, 19 S. W. 1066; *Central R. R. & B. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Leache v. State*, 22 Tex. App. 279; 2 *Elliott's Gen. Pr.* § 562.

<sup>18</sup> *Pomeroy v. Baddeley, Ry. & Moo.* 430; *Everett v. Lowdham*, 5 Car. & P. 91; *Powell v. State*, 13 Tex. App. 244.

<sup>19</sup> See *Anon*, 1 Hill (S. Car.) 254, 256; *State v. Sparrow*, 3 Murph. (N. Car.) 487; *State v. Brookshire*, 2 Ala. 303; *Dyer v. Morris*, 4 Mo. 214; *Pleasant v. State*, 15 Ark. 624; *Sartorius v. State*, 24 Miss. 602; *Bul-*

is without fault, and the witness disobeys the order for exclusion, the party ought not to be deprived of the testimony of his witness.<sup>20</sup> This latter view would seem to be the better; that is, if the party calling the witness has been guilty of no misconduct, the judge ought not to reject him. So then, in case of refusal by, or failure of, a witness to leave the room, the proper remedy would seem to be for the court to admit his testimony and to punish the witness for contempt of court.<sup>21</sup>

When a witness, who has been ordered to withdraw, converses with other witnesses after they have given their evidence, it has been held

liners v. People, 95 Ill. 394; Etheridge v. Hobbs, 77 Ga. 531; Grant v. State, 89 Ga. 396, 15 S. E. 488; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. See, also, Dyer v. Morris, 4 Mo. 214; Jackson v. State, 14 Ind. 327.

<sup>20</sup> State v. Thomas, 111 Ind. 575, 13 N. E. 35; Taylor v. State, 130 Ind. 66, 29 N. E. 415; Keith v. Wilson, 6 Mo. 435; Lyman v. State, 69 Ga. 404; Hubbard v. Hubbard, 7 Ore. 42; Chandler v. Home, 2 M. & Rob. 423; People v. O'Loughlin, 3 Utah, 133; People v. Boscovitch, 20 Cal. 436; State v. Salge, 2 Nev. 321; Davenport v. Ogg, 15 Kans. 363; State v. Flack, 48 Kans. 146, 29 Pac. 1023; Bell v. State, 44 Ala. 393; Hopper v. Commonwealth, 6 Gratt. (Va.) 684; Gregg v. State, 3 W. Va. 705; Rooks v. State, 65 Ga. 330; O'Bryan v. Allen, 95 Mo. 68. In one case the witnesses had been excluded. The defendant discovered that there was a person in the room, who had heard the testimony, in possession of facts tending to acquit him, the defendant. The person was called as a witness and rejected on objection that he had heard the other testimony. This was held error on appeal. Smith v. State, 4 Lea (Tenn.) 428. Compare Rummel v. State, 22 Tex. App. 558. In Taylor v. State, 130 Ind. 66, the court, after citing

Davis v. Byrd, 94 Ind. 525; Burk v. Andis, 98 Md. 59; and State v. Thomas, 111 Md. 515, to the effect that the evidence of a witness disobeying an order of separation should not be excluded, said: "The rule to be deduced from these cases is that, when a party is without fault and a witness disobeys an order directing a separation of the witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. We are not called upon in this case to inquire what the rule would be in a case where the party had connived at the presence of a witness in violation of the order of the court, or where he had knowingly permitted him to remain, as, in this case, it does not appear that the appellant had any knowledge of the witness' presence in the court room."

<sup>21</sup> Bell v. State, 44 Ala. 393, 395; Pleasant v. State, 15 Ark. 624; Lassiter v. State, 67 Ga. 739; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Bullinger v. People, 95 Ill. 394; State v. Falk, 46 Kans. 498; Sartorius v. State, 24 Miss. 602; State v. Sparrow, 3 Murph. (N. Car.) 487; Daughlin v. State, 18 Ohio, 99; Hopper v. Commonwealth, 6 Gratt. (Va.) 684; State v. Thomas, 111 Ind.

that the adverse party cannot demand a new trial as a matter of right for such misconduct, but the judge in his discretion may grant a new trial.<sup>22</sup> It has also been held that counsel may tell a witness what a witness on the other side has sworn to, when not forbidden to do so.<sup>23</sup> But it would be an impropriety for counsel to tell what a witness on his side had sworn to in such a case. Where a witness is guilty of misconduct by disobeying the order of the court, or by improperly communicating with other witnesses, such facts are a proper subject of comment by opposing counsel as touching his credibility.<sup>24</sup>

515; *Woods v. McPheran*, Peck (Tenn.) 371; 2 *Elliott's Gen. Pr.* § 563.

<sup>22</sup> *Bullinger v. People*, 95 Ill. 394; *State v. Brookshire*, 2 Ala. 303; *Sartorius v. State*, 24 Miss. 602; *Laughlin v. State*, 18 Ohio, 99, 51 Am. Dec. 444; *State v. Fitzsimmons*, 30 Mo. 236.

<sup>23</sup> *Horne v. Williams*, 12 Ind. 324.

<sup>24</sup> *Pleasant v. State*, 15 Ark. 624;

*Betts v. State*, 66 Ga. 508; *Taylor v. State*, 130 Ind. 66, 70, 29 N. E. 415; *Grimes v. Martin*, 10 Iowa, 347; *State v. Falk*, 46 Kans. 498, 26 Pac. 1023; *Davenport v. Ogg*, 15 Kans. 363; *McHugh v. State*, 42 Ohio St. 154, 158; *Hubbard v. Hubbard*, 7 Ore. 42; *Gregg v. State*, 3 W. Va. 705, 713; *Chandler v. Horne*, 2 M. & Rob. 423.

## CHAPTER XXXVII.

### THE EXAMINATION.

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§ 803. **Meaning of term—General rule.**—By examination, in this connection, is meant the questioning or interrogation of a witness. The direct examination, or examination in chief, consists of the series

of questions put to him by a party to the action, or his attorney, for the purpose of producing to the court and jury in proper form the information which the witness has concerning the facts and matters in dispute. The general rule is that a witness may be questioned concerning all matters material to the facts in issue.

**§ 804. Object or purpose.**—The purpose of the examination-in-chief is to present to the court and jury all of the evidence of the witness that is relevant and material; that of the cross-examination is to search and sift, to correct, and, in general, to determine the credibility of the witness and the weight and value of his testimony;<sup>1</sup> that of the re-examination, to explain, to rectify, to put in order and clear away obscurities.<sup>2</sup>

**§ 805. Witness must be sworn.**—Before any questions are put to the witness he must first be sworn, or affirmed to tell the truth. This is done by some officer of the court, usually by the clerk, or by the court itself, and it is incumbent upon the party calling the witness to see that he is properly sworn or affirmed before proceeding with the examination.<sup>3</sup> However, if such oath or affirmation is omitted, the opposite party must make seasonable objection, or all error arising on account of such omission will be deemed waived.<sup>4</sup> A witness has right, if he demand it, to be sworn or affirmed according to the form of his native country, or of the church to which he belongs.<sup>5</sup> After

<sup>1</sup> Elliott's Gen. Pr. § 620; Bassett v. Glass, 65 Kans. 500, 70 Pac. 336.

<sup>2</sup> Elliott's Gen. Pr. § 660; Commonwealth v. Wilson, 1 Gray (Mass.) 337; State v. McGahey, 3 N. Dak. 293, 55 N. W. 753; People v. Mills, 94 Mich. 630, 54 N. W. 488; Westbrook v. Aultman, & Co. 3 Ind. App. 83, 28 N. E. 1011; Merrell v. State (Tex. Cr. App.), 70 S. W. 979; State v. McQueen, 108 La. 410; Smith v. Morrill, 71 N. H. 409, 52 Atl. 928.

<sup>3</sup> Hawks v. Baker, 6 Me. 72; Davis v. Melvin, 1 Ind. 136.

<sup>4</sup> Slauter v. Whitelock, 12 Ind. 338; Cady v. Norton, 14 Pick. (Mass.) 236; Blanchard v. Richly, 7 Johns. (N. Y.) 198; Trannell v.

Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479; Nesbitt v. Dallam, 7 Gill. & J. (Md.) 494.

<sup>5</sup> Omichund v. Barker, 1 Atk. 21, 40, 42. See, also, Reg. v. Moore, 17 Cox C. C. 458, 61 L. J. Mag. Cas. 80; Doss v. Birks, 11 Humph. (Tenn.) 430; Gill v. Caldwell, 1 Ill. 53. Quakers who decline to swear are affirmed. The subject is largely regulated by statute. In New Jersey a witness cannot be affirmed unless he objects to being sworn. Williamson v. Carroll, 16 N. J. L. (1 Harr.) 217. A Chinese witness has been sworn by either killing a cock or breaking a small china saucer in his presence and then administering to him an oath which informs him that if he does not

a witness has once been sworn as a witness in a cause his oath contin-

speak the truth he will be either killed, like the cock, or broken like the saucer. *Rex v. Entrehman*, Cas. & Marsh. 249.

In many courts witnesses are required to touch or kiss a Bible at the time of being sworn, but holding up the hand is a sufficient formality. *Doss v. Birks*, 11 Humph. (Tenn.) 431; *Gill v. Caldwell*, 1 Ill. 53.

During a recent trial of a cause in one of the Philadelphia courts, after a stylish young lady, who was being examined as a witness, had partially given her testimony, one of the jurors objected on the ground that she had not kissed the Bible, after a heated discussion the judge said: "I am not surprised that the witness did not kiss the book. I would not do it either—a dirty book like that. This custom is a relic of idolatry, and the sooner it is abolished the better it will be. I don't think this witness objected to kissing the book because she intended to lie, but because it is a dirty book. I respect her regard for her person and her health." After the conclusion of the trial the judge, in response to an inquiry as to what he meant by kissing the Bible being a relic of barbarism that ought to be abolished, said: "I mean that it was established by the church to show the humiliation of the people before the first judges, who were clerics. It has been abolished in England, judicial declarations, subject to penalties, being substituted. I mean that it is a relic of a superstitious age and superstitious people, under the subjection of priestcraft. It is a relic of that age in which trial by fire took the place

of trial by jury; when a man's guilt or innocence depended on his physical capacity to resist pain and torture; but its worst feature is the dirt and disease which is imparted to the book by the constant handling it receives from dirty witnesses, and I not only would not kiss such a book myself, but have a respect for those who have enough respect for themselves to refuse to do so. It is like the custom of kissing the brass toes of graven images. Some worshipers kiss the toes until it is worn smooth, when others only stoop down and pretend to kiss it. They are just as devout as those who touch the toe with their lips, but they have too much regard for their health to touch their lips to the spot where thousands of others have been. I think swearing on the Bible should be abolished. I think a witness can take just as good an oath with the uplifted hand as on the Bible." 31 Central Law Jour. 93.

In a criminal case, an oath administered by holding up the hand, although the Bible was not presented to the witness, and he did not declare that he had conscientious scruples against being sworn thereon, no objection being made by prisoner at the time, was held good. *McKinney v. People*, 7 Ill. 540. In another old case it was held that a witness, who is not a Quaker, refusing to be sworn on the ground of conscientious scruples, on account of a declaration formerly made, was guilty of contempt; the liberty to affirm, in Massachusetts, being strictly confined to Quakers. *United States v. Coolidge*, 2 Gall. (U. S.) 364. A witness who has no objection to being sworn cannot be

ues effective throughout the whole trial, and it is not necessary to re-swear him even though he be examined on different days.<sup>6</sup>

§ 806. **Notice of intention to examine certain witnesses.**—A party to a civil action cannot be required to inform the opposite party of the names of the witnesses he will call at the trial and examine.<sup>7</sup> In a criminal case the prosecution usually places the names of witnesses for the state on the indictment, but this does not require the prosecution to use all the witnesses whose names are on the list,<sup>8</sup> nor does it, in most jurisdictions, necessarily prevent the calling of witnesses whose names are not on the list.<sup>9</sup>

§ 807. **Examination on the voir dire.**—An objection to the competency of a witness on the ground of some disqualifying cause is disposed of by examining the witness on the voir dire, or, sometimes, by extrinsic evidence upon the question.<sup>10</sup> It is obvious that the right to so examine a witness should be exercised, when possible, before he is permitted to give his testimony to the jury,<sup>11</sup> but the whole matter is largely within the discretion of the trial court.

§ 808. **Order of examination—In general.**—The usual order of examination of a witness is as follows: First. The examination by the party calling the witness; Second. The cross-examination by the other party; Third. The re-examination by the party who first examined; Fourth. The re-cross-examination by the other party. It should also be remembered that the court, at any time in its discretion,

allowed to testify under an affirmation. *Williamson v. Carroll*, 16 N. J. L. 217.

<sup>6</sup> *Bullock v. Koon*, 9 Cow. (N. Y.) 30; *State v. Weber*, 22 Mo. 321.

"If a witness is sworn before arraignment, but after the prisoner has said in court, upon being asked, that he was ready to proceed with the trial, it is unnecessary to re-swear him." *State v. Weber*, 22 Mo. 321. The fact that an oath is more comprehensive than the oath prescribed by statute is no ground for attacking its validity. *Ballance v. Underhill*, 4 Ill. 453. The meaning of "to tell the whole truth" has been held to be to tell so much of

it as may be competent evidence, and may not tend to criminate the witness himself or make him criminally liable. *Commonwealth v. Reid*, 1 Leg. Gaz. R. (Pa.) 182.

<sup>7</sup> *Thurmond v. Trammell*, 28 Tex. 371.

<sup>8</sup> *People v. Quick*, 51 Mich. 547.

<sup>9</sup> *People v. Lopez*, 26 Cal. 112. But see *Smith v. State*, 4 Greenl. (Iowa) 189.

<sup>10</sup> See ante §§ 720-722. See, also, 1 *Elliott's Gen. Pr.* § 418; 2 *Elliott's Gen. Pr.* §§ 588, 589.

<sup>11</sup> See *Trussell v. Scarlett*, 18 Fed. 214, and note; 2 *Elliott's Gen. Pr.* § 588.

may allow the witness to be recalled for further examination.<sup>12</sup> But the recalling of a witness, after he has been examined and discharged, is not a matter of right upon which the party who examined him is entitled to insist.<sup>13</sup>

**§ 809. Order of examination—As to parties and proof.**—Each party in turn puts in his proof, beginning with the one who has the burden of the issue. The plaintiff usually begins, and introduces all the testimony which he intends to offer to support his claim and make a *prima facie* case. The defendant follows by putting in all the evidence he has to disprove the plaintiff's case as set up, or, if there is an affirmative defense, he supports it by testimony. The plaintiff follows by putting in what evidence he has to explain, qualify, or contradict any matter in the defendant's testimony. The parties may so continue by alternate stages so long as the court exercising its discretionary powers so permits.<sup>14</sup> The court may allow the witness to be recalled for further examination, or evidence to be given in rebuttal that might have been given in chief.<sup>15</sup>

**§ 810. Order of examination—Reason for.**—The purpose of having system and order in the examination is apparent. "If every party had a right to introduce evidence at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the court would often be greatly embarrassed, the purposes of justice obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against."<sup>16</sup>

**§ 811. Control by the court—In general.**—The control over the manner and extent of an examination of a witness is confided, of necessity, largely to the sound judicial discretion of the judge presiding at the trial. As the temper, intelligence, interest, bias, memory, and other characteristics of witnesses are so various the trial court neces-

<sup>12</sup> *Doolittle v. Gombee*, 88 Hun (N. Y.) 364; *Williamson v. Yingling*, 93 Ind. 42, 48.

<sup>13</sup> *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; post Ch. XLIII.

<sup>14</sup> See 2 *Elliott's Gen. Pr.* § 573; *Dodge v. Dunham*, 41 Ind. 186; *Sil-*

*verman v. Foreman*, 3 E. D. Smith (N. Y.) 322.

<sup>15</sup> *Cherokee Packet Co. v. Hillson*, 95 Tenn. 1; *Holmes v. Hinkle*, 63 Ind. 518; *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836.

<sup>16</sup> *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448, 462.



sarily has a large discretion as to the examination.<sup>17</sup> Consequently there are few positive and unbending rules as to the examination of witnesses. So long as the judge does not abuse his discretion he may make any reasonable regulation consistent with the establishment and discovery of the truth. The examination is only a means to an end, the end being the ascertainment of the facts—the truths sought to be discovered—and the presiding judge may prescribe any reasonable rule tending toward that end, unless absolutely prohibited by statute or express judicial authority.<sup>18</sup> He may prescribe the manner of examination,<sup>19</sup> the extent of the examination,<sup>20</sup> and may even examine the witness himself,<sup>21</sup> or put a stop to an improper and embarrassing examination.<sup>22</sup> The judge may reasonably limit the number of witnesses as to any particular fact,<sup>23</sup> and a party, to avail himself of the refusal to allow a witness to be sworn and examined, must show that the wit-

<sup>17</sup> *Ferguson v. Hirsch*, 54 Ind. 337; *Brown v. Burrus*, 8 Mo. 26; *State v. Fox*, 25 N. J. L. 566; *State v. Lee*, 80 N. Car. 484; *Duncan v. McCullough*, 4 S. & R. (Pa.) 480; *Phil. & C. R. R. Co. v. Stimpson*, 14 Pet. 448, 462; *Livingston v. Commonwealth*, 7 Gratt. (Va.) 658; *Burt v. State*, 38 Tex. Cr. App. 397; *Buchanan v. Cook*, 70 Vt. 168; *Goodwin v. Prime*, 92 Me. 355.

<sup>18</sup> "A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice, and his action in this respect will not be reversed by this court, unless it exhibits an abuse of discretion resulting in injustice." *Huffman v. Cauble*, 86 Md. 591, 596. Particularly is this true in the case of the examination of small children. *Wade v. State*, 50 Ala. 164. Where one of several joint defendants discharged his counsel in form, for the purpose of evading a rule of court requiring the examination of wit-

nesses to be made by the counsel of the parties, it was held that the court rightly refused to permit him to examine the witness. *Singleton's Will*, 8 Dana (Ky.) 315.

<sup>19</sup> *Duncan v. McCullough*, 4 S. & R. (Pa.) 480.

<sup>20</sup> *Adriance v. Arnot*, 31 Mo. 471; *Morein v. Solomons*, 7 Rich. (S. Car.) 97; *Mulhollin v. State*, 7 Ind. 646; *Brumagim v. Bradshaw*, 39 Cal. 24.

<sup>21</sup> *Epps v. State*, 19 Ga. 102; *Huffman v. Cauble*, 86 Ind. 591.

"There is nothing wrong in the court's asking the witness any (proper) question the answer to which would throw any light upon his testimony." *Lefever v. Johnson*, 79 Ind. 554.

Even if the questions be leading. *Commonwealth v. Galavan*, 9 Allen (Mass.) 271. But this is a practice not, ordinarily, to be encouraged.

<sup>22</sup> *Peck v. Richmond*, 2 E. D. Smith (N. Y.) 380; *Varona v. Socarras*, 8 Abb. (N. Y.) Pr. 302.

<sup>23</sup> *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Gray v. St. John*, 35 Ill. 222. Post § 816.

ness was a competent witness, or it will be presumed on appeal that he was not.<sup>24</sup> After a party has once concluded his introduction of testimony it is ordinarily discretionary with the judge as to whether he will permit such a party to reopen the case.<sup>25</sup> In one case, where a witness was permitted to testify after the argument had been concluded, the court said: "This is a matter entirely within the discretion of the presiding justice. Whenever, in his opinion, the occasion requires it, he may vary the ordinary order of procedure, and at any stage of the trial permit evidence to be offered which had been omitted through inadvertence, or which had not before come to the knowledge of counsel. Nor is the exercise of this discretion subject to revision on exceptions."<sup>26</sup> Any departure from the ordinary methods of pro-

<sup>24</sup> *Carter v. Hanna*, 2 Ind. 45; *White Water Valley Canal Co. v. Dow*, 1 Ind. 141.

<sup>25</sup> *Hastings v. Palmer*, 20 Wend. (N. Y.) 225; *Leland v. Bennett*, 5 Hill (N. Y.) 286; *Ford v. Niles*, 1 Hill (N. Y.) 300; *Rex v. Stimpson*, 2 Car. & P. 415; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Marshall v. Davies*, 78 N. Y. 414; *Williams v. Hayes*, 20 N. Y. 58; *Philadelphia, &c. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448; *Tomer v. Densmore*, 8 Neb. 385; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

"In strict practice, he who has the affirmative ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally the rebutting proof of the affirmative, which closes the examination. In doing this, neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to this proof, until, by repeated experiments, he shall come up to the opinion of the court. An adherence to these rules, generally, will be found necessary in all courts of original jurisdiction; and, without them, confusion, loss of time,

captious and irritable conduct must follow. We say generally, for it will often be found necessary for the presiding judge, for good reasons, to depart from them to attain complete justice, and when they ought or ought not to be varied must, in a good measure, be left to the sound discretion and prudence of the court, and a court of error ought never to interfere for such departure, except where injustice is done by it." *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 118.

The courts have permitted a case to be reopened and evidence given even after the argument of counsel had begun. *State v. Rash*, 12 Ired. (S. Car.) 382, 55 Am. Dec. 420; *Curme v. Rauh*, 100 Ind. 247. But for the abuse of such discretionary power on appeal will lie. *Meyer v. Cullen*, 54 N. Y. 392; *Meacham v. Moore*, 59 Miss. 561.

<sup>26</sup> *State v. Martin*, 89 Me. 117, 35 Atl. 1023. See *Ruggles v. Coffin*, 70 Maine, 468; *Curme & Co. v. Rauh*, 100 Ind. 247; *Maynard v. Shorb*, 85 Ind. 501; *Wingo v. Caldwell*, 36 S. Car. 598, 14 S. E. 827; *State v. Rash*, 12 Ired. L. (N. Car.) 382, 55 Am. Dec. 420.

ceeding cannot be demanded as a matter of right; it is a matter of discretion with the court, and hence not a ground for assignment of error.

An interrogatory put by the presiding judge to a witness cannot be objected to by either party as leading in form.<sup>27</sup> In such case, however, the counsel on the other side, if he requests it, should be given an opportunity to introduce evidence in rebuttal, and given an opportunity to comment upon the testimony.<sup>28</sup> But neither party, it has been held, can cross-examine a witness so called as of right; the leave of the judge must be obtained.<sup>29</sup>

**§ 812. Examination causelessly protracted.**—Sometimes impertinent and irrelevant inquiries are gone into which waste the time of the court without clarifying the matters in issue. If the judge sees that the examination of a witness is causelessly protracted it is held that, although the responsibility is very delicate, yet he has a discretion to put an end to it.<sup>30</sup> The discretion, however, should be cautiously and soundly exercised.<sup>31</sup> The judge may interfere thus of his own volition<sup>32</sup> or upon having his attention called to the matter by counsel.

**§ 813. When witness may be checked.**—The court has the right, on its own motion, to check and silence a witness who is transcending his bounds in the testimony which he is giving.<sup>33</sup> But courts should be careful not to prejudice a party by unduly interfering with the witnesses and examination.

**§ 814. Repetition of testimony.**—It is likewise within the discretion of the judge to exclude questions on an examination which are mere repetitions of the same matters which have been gone into at

<sup>27</sup> *Commonwealth v. Galavan*, 9 Allen (Mass.) 271; *Huffman v. Caudle*, 86 Ind. 591, 596. Compare *Dunn v. The People*, 172 Ill. 582, 50 N. E. 137; *Wilkerson v. State* (Tex. Cr. App.) 57 S. W. 956; *Long v. State*, 95 Ind. 481, 487.

<sup>28</sup> *State v. Martin*, 89 Me. 117, 35 Atl. 1023.

<sup>29</sup> *Coulson v. Disborough*, 2 Q. B. (1894) 316.

<sup>30</sup> *Adriance v. Arnot*, 31 Mo. 471;

*Mulhollin v. State*, 7 Ind. 646; *Peck v. Richmond*, 2 E. D. Smith (N. Y.) 380.

<sup>31</sup> *Morein v. Solomons*, 7 Rich. (S. Car.) 104.

<sup>32</sup> *State v. McGee*, 36 La. Ann. 206.

<sup>33</sup> *Robinson v. State*, 82 Ga. 535, 9 S. E. 528; *Bowden v. Bailes*, 101 N. Car. 612, 8 S. E. 342. See, also, *Durrett v. State*, 62 Ala. 434; *People v. Turcott*, 65 Cal. 126; *State v. Farley*, 87 Iowa, 22, 53 N. W. 1089.

length and in detail.<sup>34</sup> However, if it is necessary that there be a repetition of statements by a witness, or the repetition of interrogatories until full answers are obtained, the court exercising its sound discretion will always allow it.<sup>35</sup>

**§ 815. When evidence is merely cumulative.**—It is a general rule that the court in its discretion controls the reception of evidence which is merely cumulative.<sup>36</sup> And it is not error to exclude testimony as to facts previously established by other evidence unless the court abuses its discretion.<sup>37</sup> If, however, the evidence is on a closely disputed point, it has been held error to exclude it.<sup>38</sup>

**§ 816. Limiting number of witnesses.**—So, also, the number of witnesses or depositions upon a particular fact or issue may be reasonably limited by the judge.<sup>39</sup> But this discretion should not be abused, and there are cases in which such a limitation to a very few witnesses, upon a disputed and vital point, has been held erroneous.<sup>40</sup>

<sup>34</sup> *McGuire v. Lawrence Mfg. Co.* 156 Mass. 324; *State v. Berrier*, 107 N. Car. 856; *Hughes v. Ward*, 38 Kans. 452; *Gutsch v. McIlhargey*, 69 Mich. 377; *Brown v. State*, 72 Md. 477; *Simon v. Home Ins. Co.* 58 Mich. 278; *Gulf, &c. R. Co. v. Pool*, 70 Tex. 713; *Remer v. Long Island R. Co.* 48 Hun (N. Y.) 352.

<sup>35</sup> *Joslin v. Grand Rapids Ice Co.* 53 Mich. 322; *Crow v. Marshall*, 15 Mo. 499; *Aurora v. Hillman*, 90 Ill. 61; *Patrick v. Crowe*, 15 Colo. 543.

<sup>36</sup> *Kuhn v. American Knife Co.* 9 Misc. (N. Y.) 54; *Jacksonville, &c. R. Co. v. Wellman*, 26 Fla. 344; *Delgado v. Gonzales* (Tex. Civ. App.), 28 S. W. 459.

<sup>37</sup> *Galveston, &c. R. Co. v. Watula*, 79 Tex. 577; *Mears v. Cornwall*, 73 Mich. 78; *Owen v. Williams*, 114 Ind. 179; *Lake Shore, &c. R. Co. v. Brown*, 123 Ill. 162; *Dobson v. Cothran*, 34 S. Car. 518; *Cory v. Hamilton*, 84 Iowa, 594.

<sup>38</sup> *Fenwick v. Bowling*, 50 Mo. App. 516. See also *Stillwell v. Farewell*, 64 Vt. 286; *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93, and

other authorities cited in last note to next section.

<sup>39</sup> *Preston v. Cedar Rapids*, 95 Iowa, 71, 63 N. W. 577, limited to seven in an action for damages; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568, limited to seven in a nuisance case; *Everett v. Union Pac. R. Co.* 59 Iowa, 243, to five in condemnation proceedings; *Butler v. State*, 97 Ind. 378; *White v. Hermann*, 51 Ill. 243; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. 39, 2 Elliott's Gen. Pr. § 564. A statute prescribing the number allowed to testify upon a particular point has been held constitutional. *State v. Stout*, 49 Ohio St. 270, 30 N. E. 437.

<sup>40</sup> *Ward v. Dick*, 45 Conn. 235, 29 Am. R. 677; *Fisher v. Conway*, 21 Kans. 18, 30 Am. R. 419; *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93; *Hubble v. Osborn*, 31 Ind. 249. See, also, *Gardner v. State*, 4 Ind. 632; *Green v. Phoenix Mut. Life Ins. Co.* 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576.

§ 817. **Needless interruptions of witness.**—If witnesses are needlessly interrupted by counsel in the course of the examination, it is in the discretion of the court to put an end to the interruptions and order that the witness be permitted to state his facts as a narration uninterrupted by counsel. The court may interfere and prevent the cutting off of an unfinished sentence.<sup>41</sup>

§ 818. **Indecent evidence.**—The court, in its wise discretion, may also order counsel to refrain from asking indecent questions when the facts sought to be elicited are not material to the case.<sup>42</sup> And it has been held the duty of the judge to do so in the examination of children and female witnesses.<sup>43</sup>

§ 819. **When discretion subject of review.**—The exercise of the discretion of the court is, in general, not the subject of review by an appellate court, except in those cases where an abuse of such discretion can be shown to have injured and been prejudicial to the party complaining. It is very seldom, indeed, that a judgment is reversed on the ground that the trial court abused its discretion. If there is no abuse of discretion, the appellate court will not review the action of the trial court; and even though such discretion appears to have been somewhat arbitrarily exercised, the appellate courts are slow to say that it has been abused.

§ 820. **Who may examine—Counsel may.**—It is hardly necessary to state that counsel may ask questions of witnesses. It is a rule so elementary that counsel or attorneys may examine witnesses that it is rarely stated. Indeed, it is very seldom, at the present time, that parties conduct the trial of their own cases in person.

§ 821. **Who may examine—Court may.**—At any time during the examination the judge may question the witness to such an extent as he deems necessary to enable him and the jury to arrive at the whole truth,<sup>44</sup> so long, at least, as he does not abuse his discretion in so doing.

<sup>41</sup> State v. Scott, 80 N. Car. 365.

<sup>42</sup> State v. Laxton, 78 N. Car. 564, 568; Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

<sup>43</sup> People v. White, 53 Mich. 537, 19 N. W. 174.

<sup>44</sup> Bowden v. Achor, 95 Ga. 243; Shaefer v. St. Louis, &c. R. Co. 128

Mo. 64; Lefever v. Johnson, 79 Ind.

554; Long v. State, 95 Ind. 481;

State v. Pagels, 92 Mo. 300, 310;

Palmer v. White, 10 Cush. (Mass.)

321; Commonwealth v. Galavan, 9

Allen (Mass.) 271; Sessions v. Rice,

70 Iowa, 306; De Ford v. Painter,

3 Okla. 80.

To this end he may ask questions in order to supply some omitted and legitimate facts.<sup>45</sup> Indeed, it has been held that the trial judge may not only question a witness who has already been called by one of the parties, but in his discretion he may call a witness who has not previously been called by either of the parties.<sup>46</sup> "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge is himself entitled to call him. When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."<sup>47</sup>

So a witness dismissed may be recalled and examined in order to supply some material omission.<sup>48</sup> In some jurisdictions it is held, especially in criminal cases, that it is not only the right of the trial judge to ask such questions, but his duty to do so.<sup>49</sup> But the judge has no right to ask questions that are improper,<sup>50</sup> and he should exercise care not to prejudice the jury or unduly interfere with the conduct of the case.

**§ 822. Who may examine—Jurors may.**—It has also been held that jurors may examine witnesses in order to draw out or clear up some point which is not clear, or which is uncertain.<sup>51</sup> But this is unusual, and should not be permitted to any great extent without restraint.<sup>52</sup>

**§ 823. Who may examine—When party himself may.**—A party to an action has a right to appear in court and try his own cause. He has also a right to appear as witness in his own behalf, and, notwith-

<sup>45</sup> State v. Pagels, 92 Mo. 300.

<sup>50</sup> People v. Lacoste, 37 N. Y. 192;

<sup>46</sup> Reg. v. Holden, 8 C. & P. 606,  
34 E. C. L. 547.

Sparks v. State, 59 Ala. 82.

<sup>47</sup> Coulson v. Disborough, 2 Q. B.  
(1894) 316.

<sup>51</sup> Shaefer v. St. Louis, &c. R. Co.  
128 Mo. 64. See article 13, Cent.  
Law Jour. 345.

<sup>48</sup> State v. Lee, 80 N. Car. 484.

<sup>52</sup> See State v. Merkley, 74 Ia. 695,

<sup>49</sup> State v. Nickens, 122 Mo. 607;

39 N. W. 111.

Epps v. State, 19 Ga. 102, 118.

standing the inconvenience and irregularity involved in the examination as witness of a party to the action who is his own lawyer, the court cannot refuse to receive such testimony.<sup>53</sup> "The wholesome rule of professional etiquette which holds the positions of trial lawyer and material witness to be incompatible applies as well, perhaps more strongly, to a case where the trial lawyer is his own client. The violation of this rule is, unfortunately, not without precedent, but it should be discountenanced by court and bar."<sup>54</sup>

§ 824. **What may be inquired into—In general.**—In general, all facts or matters material to the question in issue may be inquired into on the examination. The party on the direct examination must, at his peril, ask all material questions in the first instance, and, failing so to do, cannot do it as a matter of right thereafter.<sup>55</sup> When such a question has been omitted the customary procedure is to suggest the question to the court, and in its discretion the question may then be put.<sup>56</sup>

The questions propounded to a witness must call for some matters of fact which are material and relevant to the issues presented by the cause on trial. Immaterial and irrelevant questions are incompetent.<sup>57</sup> Questions, to be competent, must usually call for a statement

<sup>53</sup> *Thresher v. Stonington Bank*, 68 Conn. 201, 36 Atl. 38.

<sup>54</sup> *Thresher v. Stonington Bank*, 68 Conn. 201, 36 Atl. 38.

<sup>55</sup> *Beaulieu v. Parsons*, 2 Minn. 37; *People v. Mather*, 4 Wend. (N. Y.) 229, 249; *People v. Parton*, 49 Cal. 632; *Girault v. Adams*, 61 Md. 1, 9; *Fitzpatrick v. Papa*, 89 Ind. 17; *Rowe v. Brenton*, 3 Mann. & Ry. 133, 139.

<sup>56</sup> *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115; *R. v. Stimpson*, 2 Car. & P. 415.

<sup>57</sup> *Scofield v. Walrath*, 35 Minn. 356; *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501; *In re Hill*, 6 Ct. of Cl. 83; *Votaw v. Diehl*, 62 Iowa, 676, 13 N. W. 757; *In re MacKnight*, 11 Mont. 126, 27 Pac. 336.

If the answer to a question asked would tend to prove the matters alleged, or be a link in the chain of proof, the question may be asked.

*Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Pedigo v. Grimes*, 113 Ind. 48, 158; *Harbor v. Morgan*, 4 Md. 158; *Grand Rapids, &c. R. Co. v. Diller*, 110 Md. 223, 9 N. E. 710.

If in a series of questions and answers the answers as a whole are competent, each is competent. *Atchison, &c. R. Co. v. Stanford*, 12 Kans. 354.

Where the motive of an act done by a party to a suit is material to the issue, such party, on being made a witness, may testify as to the motive. *Wheelden v. Wilson*, 44 Me. 1.

The witness is not bound to answer questions which are not legal and pertinent to the matter in issue. *In re MacKnight*, 11 Mont. 126; *Ex p. Zeehandelaar*, 71 Cal. 238.

Immaterial and irrelevant questions may be admitted on promise to introduce other facts making

of facts, and not an opinion or conclusion of the witness.<sup>58</sup> A question as to the whole point in issue, and embracing the merits of the case, will not, ordinarily, be permitted.<sup>59</sup> A compound question is inadmissible if any part thereof is incompetent.<sup>60</sup> And so a question based on and assuming facts, which have neither been proved nor admitted, is generally improper.<sup>61</sup>

**§ 825. What may be inquired into—Intent or motive.**—If intent or motive becomes a material question in a case, a witness may generally be interrogated as to what his intent or motive was in doing the particular act or making the particular declaration.<sup>62</sup> This, however, is a matter that is elsewhere considered at length.<sup>63</sup>

**§ 826. What may be inquired into—Why witness remembers.** A witness may be questioned as to why he happens to remember. Certainty may be established by one stating the circumstances. To exclude such evidence would take away from the jury one of the most important means of determining the value of testimony by weighing it with reference to the opportunities which each witness had to know

such questions competent and proper. *Wyngert v. Norton*, 4 Mich. 286.

<sup>58</sup> See vol. I, ch. XXIX; also post ch. XLIX, *L. Lorgan v. Central, &c. R. Co.* 40 Cal. 272; *Sloan v. New York, &c. R. Co.* 45 N. Y. 125; *Parker v. Haggerty*, 1 Ala. 632; *Garret v. State*, 6 Mo. 1; *Wall v. Williams*, 11 Ala. 826; *Wolf v. Arthur*, 112 N. Car. 691, 16 S. E. 843.

He may give such testimony if the opposite party offers no objection. *Clark v. Gridley*, 35 Cal. 398; *Sterne v. State*, 20 Ala. 43.

<sup>59</sup> *Wall v. Williams*, 11 Ala. 826; *Hogan v. Reynolds*, 8 Ala. 59; *Caspar v. O'Brien*, 15 Abb. Pr. (N. Y.) 402; *Tomlin v. Hilyard*, 43 Ill. 300.

It is invading the province of the jury to submit to a witness the precise question in issue. *Conner v. Stanley*, 67 Cal. 315.

A witness cannot be asked a question the answer to which would

amount to a complete determination of the issue on trial. *Combs v. Agricultural Co.* 17 Colo. 146, 28 Pac. 966.

<sup>60</sup> *George v. Norris*, 23 Ark. 121; *Wyman v. Gould*, 47 Me. 159; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.

<sup>61</sup> *Carpenter v. Ambrosion*, 20 Ill. 170; *Klock v. State*, 60 Wis. 574, 19 N. W. 543; *People v. Graham*, 21 Cal. 261; *Sanderlin v. Sanderlin*, 24 Ga. 583; *State v. Smith*, 49 Conn. 376.

<sup>62</sup> *Conway v. Clinton*, 1 Utah, 215; *Cortland Co. v. Herkimer Co.* 44 N. Y. 22; *Berkey v. Judd*, 22 Minn. 287; *Watkins v. Wallace*, 19 Mich. 57; *Forbes v. Waller*, 25 N. Y. 430; *Perry v. Porter*, 121 Mass. 522; *Bidinger v. Bishop*, 76 Ind. 244. See *Oxford Iron Co. v. Sprodley*, 51 Ala. 171; *Law v. Payson*, 32 Me. 521; *Green v. Akers*, 53 Ga. 159.

<sup>63</sup> See Vol. I, §§ 162, 163.



and remember the facts and to judge accurately in regard to them.<sup>64</sup> Indeed, in a case,<sup>65</sup> where there was an action for damages from an injury caused by a defect in a bridge of the defendant, it was held that there was nothing erroneous in allowing sundry witnesses to state particular circumstances which directly called their attention to the hole in the bridge, constituting the alleged defect, as that the wheels of their vehicles actually ran into it, their horses shied at it, or, seeing it, they took pains to drive so as to avoid it.

**§ 827. What may be inquired into—As to impression.**—Whether a witness may testify as to his impression of a certain fact is a question which frequently arises. The answer depends mainly upon what is meant by an impression. An impression as to a past fact may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection, and is therefore spoken of as an impression. This, perhaps, is the sense in which the word is most commonly used by witnesses in giving their testimony. In this sense the impression of a witness may be evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge, because of the dimness of the inscription.

An impression, however, may mean an understanding or belief of the fact, derived from some other source than personal observation, as the information of others; or it may mean an inference or conclusion of the mind as to the existence of the fact, drawn from a knowledge of other facts. When used in these senses it is not evidence; and the objection may be understood to be that enough appears in the other statements of the witness, when considered in connection with the subject of his testimony, to show that he intended to use the word in one of those senses, as his understanding and belief, or his inference and conclusion, and not as his recollection.<sup>66</sup>

<sup>64</sup> Tomlinson v. The Town of Derby, 43 Conn. 562. And so Detroit, &c. R. Co. v. Van Steinburg, 17 Mich. 99, 107; Louisville, &c. R. Co. v. Hart, 2 Ind. App. 130, 28 N. E. 218; Stewart v. Anderson, 111 Iowa, 329, 82 N. W. 770; Bice v. State, 37 Tex. Cr. App. 38, 38 S. W. 803; Holyoke Co. v. Conklin, 2 Allen

(Mass.) 326; Commonwealth v. Chance, 174 Mass. 245, 249.

<sup>65</sup> Tomlinson v. The Town of Derby, 43 Conn. 562.

<sup>66</sup> State v. Flanders, 38 N. H. 324. See Humphries v. Parker, 52 Me. 502; Blake v. People, 73 N. Y. 586; Chase's note to Stephen Dig. Ev. art. 62.

If it is doubtful in which sense the witness uses the word "impression," the witness should be asked to explain. If, however, the parties choose to leave the testimony of a witness doubtful, by refraining to draw from him an explicit declaration of his meaning, when it is susceptible of two interpretations, one of which renders it competent and the other incompetent, it must be submitted to the jury, with proper instructions, of course, as to how they are to regard it, when they have ascertained what his meaning really was.<sup>67</sup>

**§ 828. Inquiry as to previous inconsistent statements when surprised by own witness.**—The question has also frequently arisen as to whether, when a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him. Upon this point there is considerable conflict in the authorities. Some urge that a party is not to be sacrificed to his witness, and that, since the witness does not represent the party, the latter should not be permitted to be entrapped in the interests of the opposite party. Others urge that to admit such evidence would permit the party to place before the jury declarations made out of court, by collusion, for the purpose of getting them before the jury in such a manner that they will have the same weight and effect as independent evidence in the eyes of the jury.

"Such questions," it is said, "may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof of other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only

<sup>67</sup>State v. Flanders, 38 N. H. 324. It is not necessary, if the evidence is otherwise proper, that the witness should be absolutely certain of the facts to which he testifies. Blake v. People, 73 N. Y. 586; Clark

v. Regelow, 16 Me. 246; Long v. State, 95 Ind. 481; Boyer v. Teague, 106 N. Car. 576, 11 S. E. 665, 19 Am. St. 547. But see Rounds v. McCormick, 11 Bradw. (11 Ill. App.) 220.

evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, it is not proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible. As a matter of course, such previous unsworn statements are not evidence, and, when the trial is before a jury, that instruction should be given."<sup>68</sup>

Such evidence, it is said by the supreme court of the United States, "was generally not admissible at common law. By statute in England and in many of the states, it has been provided that a party may, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony; and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised."<sup>69</sup> The better opinion seems to favor the admission of such evidence, in the discretion of the court, in order that the party may be protected against the contrivance of a shrewd witness, and there are now statutes in most jurisdictions to that effect.<sup>70</sup>

**§ 829. Anticipating or avoiding defenses.**—"When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel may, if they please, not only prove the facts

<sup>68</sup> Bullard v. Pearsall, 53 N. Y. 230.

<sup>69</sup> Hickory v. United States, 151 U. S. 303, 309, 14 Sup. Ct. 334. See, also, Adams v. Wheeler, 97 Mass. 67; Greenough v. Eccles, 5 C. B. N. S. 786; Rice v. Howard, 16 I. B. D. 681; Ryerson v. Abington, 102 Mass. 526; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, and note. The Supreme Court of the United States, we think, states the common law rule a little too positively. The matter was not well settled at common law, and even after the passage of an act of parliament,

which was doubtless intended to allow such impeachment, there still seemed to be some doubt about it.

<sup>70</sup> The authorities are reviewed and many of the state statutes are given in substance in an elaborate note on the general subject in 21 L. R. A. 418. See, also, 11 Am. Law Rev. 261; 16 Cent. Law Jour. 325; note in 82 Am. St. 59, et seq.; 2 Elliott's Gen. Pr. § 672. Greenleaf says the weight of authority favors the admission of such evidence, and Best says the weight of authority is against it.

of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justifications by way of anticipating the defense; or, if they please, content themselves with proving the fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defense is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved by the defendant, in support of the justifications, and they cannot be allowed to go beyond it."<sup>71</sup> This was the common law rule, and it is the prevailing rule in this country, that it is not improper to give anticipatory evidence in rebuttal of the defense;<sup>72</sup> but it is often dangerous to do so, for it may deprive the party who does it of the right to give further evidence on the same point in rebuttal.<sup>73</sup>

**§ 830. Compound and ambiguous questions.**—A question should, ordinarily, be single and not compound, and a witness should be allowed to complete his answer to a single fact, with any proper explanation he may desire to make, before being pressed with another question.<sup>74</sup> If a compound question is asked, part of which is relevant and admissible, and part of which is irrelevant and inadmissible, it may be rightfully excluded as an entirety.<sup>75</sup> Such questions are also calculated to confuse a witness on cross-examination, and, upon proper request, the court would doubtless require it to be separated into its several parts or reformed as a single question.<sup>76</sup> Objections to questions have also been sustained because they were too vague and ambiguous.<sup>77</sup>

<sup>71</sup> *Pierpont v. Shopland*, 1 Car. & P. 447.

<sup>72</sup> *York v. Pease*, 2 Gray (Mass.) 282; *Williams v. Dewitt*, 12 Ind. 309; *Hintz v. Graufner*, 138 Ill. 158, 27 N. E. 935. See, also, *Dunn v. People*, 29 N. Y. 523.

<sup>73</sup> *Williams v. Dewitt*, 12 Ind. 309; *Holbrook v. McBride*, 4 Gray (Mass.) 215; *Browne v. Murray*, 21 Eng. C. L. 745.

<sup>74</sup> *State v. Scott*, 80 N. Car. 365.

<sup>75</sup> *Wyman v. Gould*, 47 Me. 159; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *George v. Norris*, 23 Ark. 121.

<sup>76</sup> See 2 Elliott's Gen. Pr. § 657.

<sup>77</sup> *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Hill v. State*, 91 Tenn. 521, 19 S. W. 674. See, also, *Mann v. State*, 23 Fla. 610.

§ 831. **Questions assuming facts.**—It is generally improper, as already intimated, except, perhaps, in stating hypothetical questions, to assume material facts which are neither proved nor admitted.<sup>78</sup> Ordinarily, therefore, counsel have no right to ask a question based upon such an assumption. The reason for this rule “does not rest merely upon the consideration that such assumption of facts might mislead the witnesses, but upon the liability of such assumption or assertion of facts by counsel becoming a substitute in the minds of the jurors for evidence, and thus calculated to mislead them.”<sup>79</sup> Such a question is also objectionable as tending to lead the witness.<sup>80</sup>

§ 832. **Answers of the witness—Objections.**—In his answers the witness should state facts and not conclusions. But where a witness is interrogated as to a particular conversation or oral agreement, he is not required, in his answers, to give the exact language of such conversation or agreement, unless he distinctly remembers it,—but may give the substance thereof.<sup>81</sup> The answers of the witness must

<sup>78</sup> *Carpenter v. Ambrosion*, 20 Ill. 170; *People v. Graham*, 21 Cal. 261; *Sanderlin v. Sanderlin*, 24 Ga. 583; *State v. Smith*, 49 Conn. 376; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363. But see *Robertson v. Craver* (Ia.), 55 N. W. 492; *Hays v. State* (Tex. Cr. App.), 20 S. W. 361.

<sup>79</sup> *Haish v. Munday*, 12 Brad. (Ill.) 539, 545.

<sup>80</sup> *Klock v. State*, 60 Wis. 574, 19 N. W. 543; post § 838.

<sup>81</sup> *Thompson v. Blackwell*, 17 B. Mon. (Ky.) 609; *Burson v. Huntington*, 21 Mich. 415; *Pope v. Machias, &c. Co.* 52 Me. 535; *Chaffee v. Cox*, 1 Hilt. (N. Y.) 78; *Eaton v. Rice*, 8 N. H. 378; *Seymour v. Harvey*, 11 Conn. 275; *Maxwell v. Warner*, 11 N. H. 568; *Chambers v. Hill*, 34 Mich. 523; *Buchanan v. Atchison*, 39 Mo. 503; *Kittredge v. Russell*, 114 Mass. 67; *State v. Donovan*, 61 Iowa, 278; *Moody v. Davis*, 10 Ga. 413. See the following, which rather hold the opposite

view: *Helm v. Cantrell*, 59 Ill. 525; *Haywood v. Foster*, 16 Ohio, 88; *Crews v. Threadgill*, 35 Ala. 334.

Although it may not be allowable for a witness to state a conclusion, it is competent for one informed upon the subject to answer whether certain persons did, at a time and place designated, enter into an agreement to run, as a company, a line of stages; for though the question whether a partnership existed may involve a legal inquiry, it is a distinct fact, whether an agreement was entered into with a view to its creation. *Anderson v. Snow*, 9 Ala. 247.

A witness may testify to the result of the items of an account—the amount of profit or loss—rather than to the items and facts themselves, where no objection is made to such form of testifying. *Clark v. Gridley*, 35 Cal. 398.

Although a witness begins his statement by saying, “It was my understanding,” yet, if it is ap-

be responsive to the questions asked or they will be stricken out<sup>82</sup> on proper motion. Receiving an answer to an improper question will not constitute reversible error unless objection is made at the time.<sup>83</sup> The objection must be specific and not general.<sup>84</sup> Where the answer to a question extends beyond what is called for by the question, objection must be made to the answer, and the court will strike it out.<sup>85</sup> A question may be entirely proper; and where this is the

parent that he is testifying from his knowledge and recollection, his answer is admissible. *Lockett v. Mims*, 27 Ga. 207.

<sup>82</sup> *McLear v. Hunsicker*, 29 La. Ann. 539; *Streeter v. Sawyer*, 28 N. H. 555; *Guild v. Aller*, 2 Harr. (N. J.) 310; *Ryan v. People*, 79 N. Y. 593; *Rome, &c. R. Co. v. Sullivan*, 14 Ga. 277; *Schultz v. State*, 5 Tex. App. 390; *Allison v. Hubbell*, 17 Ind. 559; *Kennedy v. Upshaw*, 66 Tex. 442.

To a question as to whether the witness heard a particular conversation about the plaintiff, and calling for all the circumstances, an answer, "I do not remember that the plaintiff's name was then mentioned," is responsive. *Smith v. Gaffard*, 33 Ala. 168.

<sup>83</sup> *Harris v. Panama, &c. R. Co.* 5 Bosw. (N. Y.) 312; *Carter v. Beals*, 44 N. H. 408; *Goldsmith v. Picard*, 27 Ala. 142; *Sims v. Givan*, 2 Blackf. (Ind.) 461; *Memphis, &c. R. Co. v. Bibb*, 1 Ala. Sel. Cas. 630; *People v. Lohman*, 2 Barb. (N. Y.) 216; *State v. Nutting*, 39 Me. 359; *Sanchez v. People*, 22 N. Y. 147; *Scott v. Jester*, 13 Ark. 437; *Towns v. Alford*, 2 Ala. 378; *Morrissey v. People*, 11 Mich. 327; *Pearson v. Fiske*, 2 Hilt. (N. Y.) 146; *Minuse v. Cox*, 5 Johns. (N. Y.) Ch. 441.

<sup>84</sup> *Yarborough v. Moss*, 9 Ala. 382; *Barnes v. Ingalls*, 39 Ala. 193; *Dunning v. Rankin*, 19 Cal. 640; *Tattersall v. Hass*, 1 Hilt. (N. Y.) 56; *But-*

*trick v. Gilman*, 22 Wis. 356; *State v. Flanders*, 38 N. H. 324; *Crosby v. Day*, 81 N. Y. 242; *Hunt v. Hoboken, &c. Co.* 1 Hilt. (N. Y.) 161; *Mallory v. Perkins*, 9 Bosw. (N. Y.) 572.

<sup>85</sup> See, also, Chapter XL on Objections and Exceptions. *Barnes v. Ingalls*, 39 Ala. 193; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Morgan v. Winston*, 2 Swan. (Tenn.) 472.

"The objection to the testimony of the witness Heather, in answer to the question whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, is untenable; for it was not taken in the court below. The question was there objected to, not the answer. The question only inquired as to the witness's ability to judge from an existing fact what a previous fact might have been, and in itself was unobjectionable. If his answer went beyond the question, it was to that the objection of counsel should have been directed, by a motion to exclude it as not responsive, or otherwise improper, or as incompetent testimony." *Gould v. Day*, 94 U. S. 405, 414.

Where a witness was asked several questions pertaining to the same point in immediate succession, and an objection to the first, which was merely preliminary to

case, it is obvious that the objection may, and generally must, be made to the irresponsible answer.<sup>86</sup> Ordinarily, of course, proper questions should be required; but it sometimes happens, unfortunately, that the only attorney upon one side of a case may find it necessary to testify, and it is not an abuse of the discretion of the court to permit him to testify in narrative form without the use of questions.<sup>87</sup>

the others, was improperly overruled, and exception taken, it was held that the objection might be regarded as going not merely to that question, but to the others which sprang naturally from it. *Barton v. Kane*, 17 Wis. 37.

A leading question, prejudicial to the party asking it, cannot be successfully objected to by the opposite party. *Cochran v. Miller*, 13 Iowa, 128.

Where an objection to a question to a witness could not be sustained without assuming a fact about which there was a conflict of testimony, the objection was held properly overruled. *Adams v. Capron*, 21 Md. 186.

"If a question to a witness, on being objected to, is allowed to be put, whether the question is a proper one or not, it is not ground of exception unless the answer is illegal testimony for the party calling the witness." *Miller v. Houcke*, 2 Ill. 501.

<sup>86</sup> *Birmingham, &c. Co. v. Jackson*, 136 Ala. 279, 34 So. 994, post, § 884.

<sup>87</sup> *Goldsmith v. Newhouse* (Colo. App.), 72 Pac. 809. See, also, *Northern Pac. R. Co. v. Charless*, 51 Fed. 562, 2 C. C. A. 380; *Clark v. Field*, 42 Mich. 342, 4 N. W. 19.

## CHAPTER XXXVIII.

### LEADING QUESTIONS.

Sec.	Sec.
833. Meaning of term.	846. Exceptions to rule—Where witness is unwilling or hostile.
834. The rule.	847. Exceptions to rule—When in aid of memory.
835. The reason of the rule.	848. Exceptions to rule—On questions of identification.
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838. Assuming facts established.	851. Whether or not on cross-examination.
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840. Questions held not leading.	853. Court may ask.
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§ 833. **Meaning of term.**—By leading questions is meant questions which indicate or suggest the desired answers.<sup>1</sup> In other words, the term means what its name indicates,—questions which lead the witness up to the answer desired. Questions that embody a material fact and admit of a mere affirmative or negative answer are usually leading.<sup>2</sup>

<sup>1</sup> Page v. Parker, 40 N. H. 47, 63; Snyder v. Snyder, 6 Binn. (Pa.) 483; Coogler v. Rhodes, 38 Fla. 240, 21 So. 109; Parkin v. Moon, 7 C. & P. 408. See, also, Turney v. State,

8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74, and note.

<sup>2</sup> People v. Mather, 4 Wend. (N. Y.) 229; Osborn v. Forshee, 22 Mich. 209; Harvey v. Osborn, 55 Ind. 535;



§ 834. **The rule.**—In the examination-in-chief or direct examination of a witness, leading questions will not, as a rule, be permitted.<sup>3</sup> There are, however, as will hereafter appear, several limitations or exceptions, and the whole matter is largely within the discretion of the trial court.

§ 835. **The reason of the rule.**—The purpose of the rule is to avoid the danger that the examiner may suggest, and the witness, unwittingly or otherwise, may assent to or repeat a form of words which is not his true and unaided answer. The rule proceeds upon the theory that since the witness is presumably biased in favor of the party producing him, such party, by means of leading questions, would bring out only so much of the information of the witness as would be favorable to his case or give a false color to the whole.

§ 836. **What questions are leading—In general.**—A question is leading which suggests to the witness the answer which he is to make or which puts into his mouth words which he is to repeat in his answer.<sup>4</sup> A question is a leading one, when it indicates to the wit-

Proper v. State, 85 Wis. 615, 626; Daly v. Melendy, 32 Neb. 852; United States v. Angell, 11 Fed. 34; Alabama, &c. R. Co. v. Hill, 93 Ala. 514, 520.

<sup>3</sup>Page v. Parker, 40 N. H. 47; Stringfellow v. State, 26 Miss. 157; People v. Mather, 4 Wend. (N. Y.) 229; Able v. Sparks, 6 Tex. 349; United States v. Dickinson, 2 McLean (U. S.) 325; Parkin v. Moon, 7 Car. & P. 408. The rule is subject to exceptions hereafter noted. Turney v. State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74; Snyder v. Snyder, 6 Binn. (Pa.) 483; Torrance v. Hurst, 1 Walk. (Miss.) 403; Mathis v. Buford, 17 Tex. 152; People v. Mather, 4 Wend. (N. Y.) 229; Stringfellow v. State, 26 Miss. 157; Able v. Sparks, 6 Tex. 349; McLean v. Thorp, 3 Mo. 215; Bank of Northern Liberties v. Davis, 6 Watts & S. (Pa.) 285; Towns v. Telford, 2 Ala. 378; Sadler v. Murrah, 3 How. (Miss.) 195; Strawbridge v. Spann,

8 Ala. 820; Long v. Steiger, 8 Tex. 460; Willis v. Quimby, 11 Fost. (N. H.) 485; State v. Parce, 37 La. Ann. 268; Alabama, &c. R. Co. v. Hill, 90 Ala. 71; Duckert v. Whitson, 112 N. Car. 44, 16 S. E. 854.

The words cannot be put into the mouth of the witness to echo back again, even in the case of a hostile witness on cross-examination. Clingman v. Irvine, 40 Ill. App. 606.

Compare Coogler v. Rhodes, 38 Fla. 240, 244; International, &c. R. Co. v. Dalwigh (Tex. Civ. App.), 51 S. W. 500; Bartlett v. Hoyt, 33 N. H. 151, 165.

<sup>4</sup>Turney v. State, 16 Miss. 104, 47 Am. Dec. 74; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Page v. Parker, 40 N. H. 47; Harvey v. Osborn, 55 Ind. 535; Torrance v. Hurst, 1 Miss. 403; Able v. Sparks, 6 Tex. 349; Stringfellow v. State, 26 Miss. 157; Mathis v. Buford, 17 Tex. 152; Daly v. Melendy, 32 Neb. 852, 49 N. W. 926.

ness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Are you not in the service of such and such a person? Did he not promise you so and so at a certain time? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may, indeed,

A question is not leading, merely because answerable by "yes" or "no," if it does not suggest the desired answer. *McKeown v. Harvey*, 40 Mich. 226.

A question "which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, or plainly suggests the answer which the party wishes to get from him, whether it be put in the alternative form or not," is leading. *Page v. Parker*, 40 N. H. 47.

The fact that the question can be answered by "yes" or "no" does not make it leading, for often questions are so framed as to admit of an affirmative or negative answer, but no way suggest which is sought or expected. *Floyd v. State*, 30 Ala. 511; *Dudley v. Elkins*, 39 N. H. 78; *Adams v. Harrold*, 29 Ind. 198; *Spear v. Richardson*, 37 N. H. 23; *Mathis v. Buford*, 17 Tex. 152; *Trammell v. McDade*, 29 Tex. 360; *Iselin v. Peck*, 2 Rob. (N. Y.) 629.

The following have been held leading and inadmissible: "Did you make any agreement at that time?" *Dudley v. Elkins*, 39 N. H. 78. "State whether or not you had any difficulty in following the tracks?" *Hopper v. Commonwealth*, 6 Gratt. (Va.) 684. "Was witness in the habit of acting by said A.'s consent and with his approbation to every extent in reference to buying goods, or otherwise providing for A.'s stores during his absence?" *Lee v. Tinges*, 7 Md. 215. "Did the defendant state

to you, and in your presence, on the morning and just before he sent you for said sheep, that it was not his, and not to bring it over?" *Luttrell v. State*, 14 Tex. App. 147. "Whether or not defendant admitted, in conversation, that plaintiff had not received his portion of the estate?" *McLean v. Thorp*, 3 Mo. 215. "Are not ordinary animals, such as are ordinarily used on farms, apt to be frightened and nervous and skittish when driven on plank roads and bridges?" *Baldridge, &c. Co. v. Cartrett*, 75 Tex. 628. "State whether or not" the grantor "gave his daughter," a grantee, "one half the land." *Hicks v. Sharp*, 89 Ga. 311, 15 S. E. 314. The following have been held not leading and properly admissible: "Did Peter Rhodes tell you where that corner was?" *Kemmerer v. Edelman*, 23 Pa. St. 143. "For whom did your husband do what business he did after he took the deed?" *Knapp v. Smith*, 27 N. Y. 277. "What was the nature of the conversation between said parties, and were they in earnest, or was the talk a matter of joke between them?" *Willis v. Quimby*, 31 N. H. 485. "Do you know whether A. B. was ever prosecuted for stealing a gray stud horse; if so, by whom and where?" *Sexton v. Brock*, 15 Ark. 345. "Do you know any circumstances which will show that the defendant knew his son went to school in the year 1854?" *Floyd v. State*, 30 Ala. 511. "What have you seen by the way of intoxicating

be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information, is, in reality, giving instead of receiving it. But the mere suggestion of a subject in a question does not make it leading where the answer is not suggested.<sup>5</sup> The form of a question does not always determine whether it is leading. A question that may be answered by "yes" or "no" is usually considered leading, yet this does not of itself necessarily make it leading, although it may.<sup>6</sup> So, it is frequently considered sufficient to escape the rule by using the term "whether or not," but this does not necessarily keep the question from being leading.<sup>7</sup>

liquors being sold between July 1, 1860, and April 15, 1861, in that building?" *State v. Schilling*, 14 Iowa, 455. "Whether or not testator's insanity took the form of dislike to his relatives and friends." *Pela Mourges v. Clark*, 9 Iowa, 1. A question which merely repeats what the witness has previously said is not open to the objection that it is leading. *Brice v. Miller*, 35 S. Car. 537. The prosecuting attorney, on a murder trial, propounded to a witness the following question: "I understand you to say that when you got there, after running there, you found one man lying partly on the banquette and partly in the gutter, dead?" It was held that the question was not leading, being simply a recapitulation of what the witness had previously testified, and was used only to direct his attention to further questions. *State v. Walsh*, 44 La. Ann. 1122, 11 So. 811. In a suit for breach of marriage promise, after a witness for the plaintiff had testified that the defendant had paid attentions to the plaintiff, the plaintiff's counsel asked the question, "Did he court her?" Held, that the question was not improper, either as being too leading, or as requiring more than ordinary

skill and judgment to answer. *Greenup v. Stoker*, 8 Ill. 202. Defendant's question to a witness, couched in the language of plaintiff's petition, for the purpose of directing the witness's attention to the particular subject of inquiry, is not objectionable as "leading, suggestive, or assuming what is not proved." *Shields v. Guffey*, 9 Iowa, 322. The following question, when not objected to as leading, was not erroneously allowed: "Did not your uncle tell you, in the presence of the defendant, to wait until your mother came home the next morning, and she would tell you what to say about the slut?" *Smith v. State*, 21 Tex. App. 277. "No question is leading which does not suggest an answer." *Stoudt v. Shepherd*, 73 Mich. 588. See generally on leading questions: *Vawter v. Ohio, &c. Co.* 14 Ind. 174.

<sup>5</sup> *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089; *Cluverius v. Commonwealth*, 81 Va. 787, 800; note to *Lurney v. State*, 47 Am. Dec. 84, 85.

<sup>6</sup> *Mathis v. Buford*, 17 Tex. 152; *Spear v. Richardson*, 37 N. H. 23; *Floyd v. State*, 30 Ala. 511; *Adams v. Harrold*, 29 Ind. 198; ante p. 128, n.

<sup>7</sup> *Willis v. Quimby*, 31 N. H. 485, 490.

§ 837. **Questions preceded by "whether or not."**—A question in the form "whether or not" may be objectionable as leading. The nature of the question and its subject matter may be such that, framed in a particular way, it will suggest to the mind of the witness the answer desired, as well as if commenced in the alternative form, whether or no, as without it.<sup>8</sup> For, in whatever form the question is phrased, if it suggests to the witness the answer desired it is leading. This has frequently been held of questions in the form of "whether or not," that is, questions in the alternative.<sup>9</sup>

§ 838. **Assuming facts established.**—A question is leading which assumes facts as having been established when they have not, or which assumes that particular answers have been made, which have not.<sup>10</sup> There are also other objections to such questions, and to these attention has already been called.<sup>11</sup>

§ 839. **Accent, emphasis and manner.**—The mere emphasis, accent or manner of the examiner may account for much in determining whether a question is leading. The discretion of the court must largely govern in dealing with this question.<sup>12</sup> It would be almost impossible, however, to get such a matter into the record even if the court did not have such a wide discretion as it has.

§ 840. **Questions held not leading.**—The following interrogatories have been held not to be leading: "Do you know whether he was ever prosecuted for stealing a horse, if so, by whom and where?"<sup>13</sup> "Whether or not testator's insanity took the form of dislike to his relatives and friends?"<sup>14</sup> "State whether or not this is a true copy of the award."<sup>15</sup> So, asking a witness if he knows a party to the action,<sup>16</sup> if he knows whether or not the defendant bought his father's homestead,<sup>17</sup> what he had seen in the way of intoxicating liquors

<sup>8</sup> Bartlett v. Hoyt, 33 N. H. 151, 165; State v. Johnson, 29 La. Ann. 717; Webster v. Clark, 30 N. H. 245. See, also, Steer v. Little, 44 N. H. 613, 616; People v. Mather, 4 Wend. (N. Y.) 229.

<sup>9</sup> State v. Watson, 81 Iowa, 380, 46 N. W. 868; Bartlett v. Hoyt, 33 N. H. 151; Pelamourges v. Clark, 9 Iowa, 1; State v. Johnson, 29 La. Ann. 717; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

<sup>10</sup> Steer v. Little, 44 N. H. 613,

616; Carpenter v. Ambrosion, 20 Ill. 172; Davis v. Cook, 14 Nev. 265, 287; Re Hine, 68 Conn. 551; Klock v. State, 60 Wis. 574, 19 N. W. 543.

<sup>11</sup> Ante, § 831.

<sup>12</sup> Thayer Cas. Ev. 2d Ed. p. 1201.

<sup>13</sup> Sexton v. Brock, 15 Ark. 345.

<sup>14</sup> Pelamourges v. Clark, 9 Iowa, 1.

<sup>15</sup> Adams v. Harrold, 29 Ind. 198.

<sup>16</sup> Paschal v. State, 89 Ga. 303.

<sup>17</sup> Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492.

being sold in a building,<sup>18</sup> whether when he hailed the car he stopped on the sidewalk or continued walking until he got near the car,<sup>19</sup> have all been held not leading.<sup>20</sup>

**§ 841. Questions held leading.**—The following interrogatories have been held leading and objectionable: "State whether or not you had any difficulty in following the tracks"<sup>21</sup> "From your knowledge and experience as engineer, was it possible to have stopped the train after you saw the plaintiff on the track?"<sup>22</sup> "Did you make any agreement at that time?"<sup>23</sup> So, also, the following have been held objectionable as leading questions: A question asking an officer if he was instructed to go to a certain place for several days before an attachment in suit was levied;<sup>24</sup> a question to a motorman of a trolley line as to whether he had done all he could to prevent the car from running over the person injured;<sup>25</sup> a question to a party in an ejectment suit as to whether he had ever admitted that the land in dispute did not belong to him;<sup>26</sup> a question to a surveyor, as to whether there were any marks to show that any other persons ever got any of the land.<sup>27</sup> In one case the following question was held to be leading:<sup>28</sup> "State whether or not you, in substance or effect, addressed the defendant as one of those concerned in the transaction." It was changed to "How did you address the defendant in respect to his being one of the persons concerned," and still held to be leading.

**§ 842. Court's discretion.**—Whether or not a question is leading is to be determined by the trial court.<sup>29</sup> The matter of allowing leading questions is almost entirely within the discretion of the

<sup>18</sup> State v. Schilling, 14 Iowa, 455.

<sup>19</sup> Olfermann v. Union Depot R. Co. 125 Mo. 408, 28 S. W. 742.

<sup>20</sup> See note on p. 128, *supra* for other cases.

<sup>21</sup> Hopper v. Commonwealth, 6 Gratt. (Va.) 684.

<sup>22</sup> Galveston, H. & S. A. R. Co. v. Duelin, 86 Tex. 450.

<sup>23</sup> Dudley v. Elkins, 39 N. H. 78.

<sup>24</sup> Goeschel v. Fisher, 108 Mich. 212, 65 N. W. 965.

<sup>25</sup> Springfield, &c. R. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034.

<sup>26</sup> Watrous v. Morrison, 33 Fla. 261.

<sup>27</sup> Rapley v. Klugh, 40 S. Car. 134.

<sup>28</sup> People v. Mather, 4 Wend. (N. Y.) 229.

<sup>29</sup> Blevins v. Pope, 7 Ala. 371, 374; St. Clair v. United States, 154 U. S. 134, 150, 14 Sup. Ct. 1002; Crenshaw v. Johnson, 120 N. Car. 270, 26 S. E. 810; State v. Johnson, 43 S. Car. 123; Welch v. Stipe, 95 Ga. 762; Shockey v. Mills, 71 Ind. 288, 291; Doran v. Mullen, 78 Ill. 342, 345; People v. Golderson, 76 Cal. 328, 349; Francis v. Rosa, 151 Mass. 532, 534, 24 N. E. 1024; State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

judge.<sup>30</sup> Such questions, however, are only admitted under the exercise of a careful supervision and sound discretion of the court, where it appears essential to promote justice. The exercise of this discretion will not, as a general rule, be reviewed and reversed on appeal, but if a party is deprived of competent testimony by a clear abuse of discretion, or if there is a clear and harmful abuse in allowing leading questions on the part of the court, this, in many jurisdictions, may be cause for reversal, even though the mere allowance or disallowance of leading questions could not be successfully questioned in ordinary cases.<sup>31</sup>

§ 843. **Exceptions to rule—In general.**—It is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness, as when he is manifestly reluctant and hostile to the interests of the party calling him, or when he has exhausted his memory without stating the particular required, where it is a proper name, or other fact, which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required, only by a pointed or leading question.<sup>32</sup> These,

<sup>30</sup> *People v. Fong Ah Sing*, 70 Cal. 8; *Sanger v. Flow*, 48 Fed. 152; *Donnell v. Jones*, 13 Ala. 490; *State v. Lull*, 37 Me. 246; *Green v. Gould*, 3 Allen (Mass.) 465; *Severance v. Carr*, 43 N. H. 65; *Sears v. Shafer*, 1 Barb. (N. Y.) 408; *Barton v. Kane*, 17 Wis. 37; *Blevins v. Pope*, 7 Ala. 371; *York v. Pease*, 2 Gray (Mass.) 282; *Smith v. Hutchings*, 30 Mo. 380; *Walker v. Dunspaugh*, 20 N. Y. 170; *Budlong v. Van Nostrand*, 24 Barb. (N. Y.) 25; *Clarke v. Saffery, Ry. & M.* 126; *Yarborough v. Moss*, 9 Ala. 382; *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179; *Wallace v. Taunton, &c. R. Co.* 119 Mass. 91; *Schultz v. Third Avenue R. Co.* 89 N. Y. 242; *State v. Pugsley*, 75 Iowa, 742; *State v. Chee Gong*, 16 Ore. 534; *Cade v. Hatcher*, 72 Ga. 359; *State v. Chee Gong*, 17 Ore. 635; *Huntsville, &c. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Williams v. Jarrot*, 6 Ill. 120;

*Cheaney v. Arnold*, 18 Barb. (N. Y.) 434.

<sup>31</sup> *App v. State*, 90 Ind. 73. There must be an abuse of discretion or the appellate court will not interfere. *Goudy v. Werbe*, 117 Ind. 154; *White v. White*, 82 Cal. 427; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714. The exercise of this discretion cannot, ordinarily, be appealed from; but when its effect is to deprive the party of competent testimony, an appeal is allowable. *Gunter v. Watson*, 4 Jones (N. Car.) 455. On appeal, the action of the trial court, in permitting leading questions to be asked, will not be reviewed by the Supreme Court. *Southern Express Co. v. Van Meter*, 12 Fla. 783; *State v. Fooks*, 29 Kans. 425.

<sup>32</sup> *Moody v. Powell*, 17 Pick. (Mass.) 490; 2 *Elliott's Gen. Pr.* § 613; note in 47 *Am. Dec.* 83-85.

and one or two other instances in which leading questions are frequently permitted, will be considered in the following sections.

§ 844. **Exceptions to rule—When merely introductory.**—Questions which are preliminary and merely lead up to the material facts which are in issue, should usually be permitted. It saves time and is often necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry.<sup>33</sup> The witness may be led as to such preliminary facts as residence, business relations, connection with the suit and parties, and he may have his attention directed to the special subject of inquiry about which he was called to give his evidence. As an illustration of this latter, the following question was allowed: "State what you know, if anything, about your father ever recognizing A, that afterwards married B, and afterwards C, as his child."<sup>34</sup> Were such questions not permitted the examination would be extended most inconveniently. So it is held a witness may properly be led up to the facts in issue on which he was called to testify, and may have stated to him the facts admitted and established.

§ 845. **Exceptions to rule—Defect of speech—Ignorance—Child.** It may be necessary to put a leading question to one having a defect of speech.<sup>35</sup> So, leading questions may be put to children of tender years when it is otherwise difficult to make them understand and to obtain their testimony on the facts.<sup>36</sup> Where a witness is ignorant, or of feeble intellect, the court in its discretion may permit leading

<sup>33</sup> *People v. Mather*, 4 Wend. (N. Y.) 230, 247; *Long v. Steiger*, 8 Tex. 460; *Sadler v. Murrah*, 3 How. (Miss.) 195, 201; *Magee v. State*, 32 Ala. 575; *Gannon v. Stevens*, 13 Kans. 447, 457; *Hale v. Taylor*, 45 N. H. 405, 407; *Hansenfluck v. Commonwealth*, 85 Va. 702, 707; *Lowe v. Lowe*, 40 Iowa, 220; note to *Turney v. State*, 47 Am. Dec. 84. It was held proper where, to prove the contents of an award which was shown to have been lost, the plaintiff put a paper in the hands of the witness, and asked, "State whether or not this is a true copy of the award." *Adams v. Harrold*, 29 Ind. 198.

<sup>34</sup> *De Haven v. De Haven*, 77 Ind. 236, 240. Such questions are not really leading within the meaning of the rule, and would, perhaps, come under the head of limitations or inapplicability of the rule more properly than under the head of exceptions. See, also, *Harvey v. Osborne*, 55 Ind. 535; *Lincoln v. Wright*, 4 Beav. 166.

<sup>35</sup> *Belknap v. Stewart*, 38 Neb. 304, 310, 56 N. W. 881.

<sup>36</sup> *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Sullivan v. Sullivan*, 48 Ill. App. 435; *Hodge v. State*, 26 Fla. 11; *Ulrich v. People*, 39 Mich. 245, 251; *Moody v. Powell*, 17 Pick. (Mass.) 490, 498. See *Coon v. People*, 99 Ill. 368.

questions to be put.<sup>37</sup> So, also, where the witness has an imperfect knowledge of the English language or is ignorant of the language.<sup>38</sup>

**§ 846. Exceptions to rule—Where witness is unwilling or hostile.**

Where witness purposely evades answering proper interrogatories, it is within the discretion of the court to permit leading questions to be put.<sup>39</sup> If, for instance, during the direct examination of a witness it appears that he is adverse in sympathy and interest, and, in fact, hostile to the party who called him, the court in its discretion may, and often should, relax the rule as to leading questions, and permit the direct examination to take to some extent the character of a cross-examination, and allow leading questions to be put the same as if the witness had been called by the opposing party.<sup>40</sup> It has been held that this is a matter of discretion, and that no exception will lie to a refusal by the court to permit it to be done,<sup>41</sup> but other authorities say that it is a matter of right in a proper case.<sup>42</sup>

**§ 847. Exceptions to rule—When in aid of memory.**—Where a witness forgets a material fact interrogatories may often be so framed as to lead him to the topic.<sup>43</sup> That is, where an omission in his testi-

<sup>37</sup> *Doran v. Mullen*, 78 Ill. 342, 345; *State v. Benner*, 64 Me. 267.

<sup>38</sup> *People v. Jensen*, 66 Mich. 711; *Navarro v. State*, 24 Tex. App. 378.

<sup>39</sup> *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *State v. Benner*, 64 Me. 267, 279; *State v. Keith*, 53 Mo. App. 383; *McBride v. Wallace*, 62 Mich. 453; *People v. Caldwell*, 107 Mich. 374, 65 N. W. 213; *State v. Farley*, 87 Iowa, 22, 53 N. W. 1089; *Putnam v. United States*, 162 U. S. 687, 16 Sup. Ct. 923 *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *Hopkinson v. Steel*, 12 Vt. 582; *Baker v. State*, 69 Wis. 32.

<sup>40</sup> *St. Clair v. United States*, 154 U. S. 134, 150, 14 Sup. Ct. 1002; *State v. Benner*, 64 Me. 267, 279; *Meixsell v. Feezor*, 43 Ill. App. 180; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Commonwealth v. Thrasher*, 11 Gray (Mass.) 57; *McBride v. Wallace*, 62 Mich. 451, 29 N. W. 75; *State v. Toll*, 43

*Minn.* 273, 45 N. W. 449; *State v. Keith*, 53 Mo. App. 383; *Fisher v. Hart*, 149 Pa. St. 232, 24 Atl. 225; *Schuster v. State*, 80 Wis. 107, 49 N. W. 30; *Bullard v. Pearsall*, 53 N. Y. 230; *Towns v. Alford*, 2 Ala. 378; *Doran v. Mullen*, 78 Ill. 342; *Reg. v. Chapman*, 8 Car. & P. 558; *People v. Mather*, 4 Wend. (N. Y.) 229; *Bradshaw v. Combs*, 102 Ill. 428; *People v. Sherman*, 133 N. Y. 349. Compare *Wells v. Jackson, &c. Co.* 48 N. H. 491.

<sup>41</sup> *Wells v. Jackson, &c. Manf. Co.* 48 N. H. 491; *Williams v. Allen*, 40 Ind. 295.

<sup>42</sup> *Parsons v. Bridgham*, 34 Me. 240; *Steene v. Aylesworth*, 18 Conn. 244; *Clarke v. Saffery, Ry. & M.* 126, 21 E. C. L. 126.

<sup>43</sup> *Farrell v. Boston*, 161 Mass. 106, 36 N. E. 751; *O'Hagan v. Dillon*, 76 N. Y. 170; *Kemmerer v. Edelman*, 23 Pa. St. 143; *Born v. Rosenow*, 84



mony is caused by want of recollection, which a proper suggestion may assist, the court may allow it to be made. For example, where witness testified that he could not repeat the names of the members of a firm, but felt he could if the names were suggested, the court permitted the suggestion to be made.<sup>44</sup> So, where a transaction involves many items or dates, to aid the memory of the witness, his attention may be called to them.<sup>45</sup> So a question may be put to a witness to aid him in recollecting a certain fact testified to at a former hearing.<sup>46</sup>

**§ 848. Exceptions to rule—On question of identification.**—A witness may also be asked whether the person pointed out to him is the person in question.<sup>47</sup> The evidence, however, would have more effect upon the jury if he could point out the person without any assistance.<sup>48</sup>

**§ 849. Exceptions to rule—Where witness is adverse party.** Where one party is compelled to call the other party as a witness leading questions may be asked, and it is held that such questions may be asked as a matter of right.<sup>49</sup> This is often provided for by statute. In one case<sup>50</sup> it is said: "An adverse witness may be cross-examined,

Wis. 620, 54 N. W. 1089; Louisville, &c. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Lowe v. Lowe, 40 Iowa, 220; State v. Walsh, 44 La. Ann. 1122, 11 So. 811; Hartsfield v. State (Tex. Cr. App.), 29 S. W. 777; Shields v. Guffey, 9 Iowa, 322; Long v. Steiger, 8 Tex. 460; Carlyle v. Plumer, 11 Wis. 96; Huckins v. Insurance Co. 31 N. H. 238; Doran v. Mullen, 78 Ill. 342. "A judge, at the trial, may permit counsel, on a direct examination, to suggest to a witness names, dates and items, provided that the witness has exhausted his memory, and the purposes of justice require such a course to be taken." *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238.

"*Herring v. Skaggs*, 73 Ala. 446, 453; *Severance v. Carr*, 43 N. H. 65, 67; *O'Hagan v. Dillon*, 76 N. Y. 170, 173; *Kemmerer v. Edelman*, 23 Pa. St. 143; *Acerro v. Petroni*, 1 Stark. 80.

"*Graves v. Merchants', &c. Ins. Co.* 82 Iowa, 637, 49 N. W. 65; *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238; *Strawbridge v. Sponn*, 8 Ala. 820; *Mathis v. Buford*, 17 Tex. 152.

"*People v. Palmer*, 105 Mich. 568, 63 N. W. 656; *Ehrisman v. Scott*, 5 Ind. App. 596, 32 N. E. 867; *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261.

"*Sadler v. Murrah*, 4 Miss. 195; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Reg. v. Watson*, 2 Stark. Cas. 104, 128; *Rex v. Berenger*, 2 Stark. Cas. 129 n.; 3 Eng. Com. L. 128.

<sup>48</sup> 2 Best Ev. § 643.

<sup>49</sup> *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532; *Clarke v. Saffery*, Ryan & M. 126; *In re Brown*, 38 Minn. 112; *Coates v. Wilkes*, 92 N. Car. 376.

<sup>50</sup> *Becker v. Koch*, 104 N. Y. 394, 401, 10 N. E. 701. See, also, *Bru-baker v. Taylor*, 76 Pa. St. 83.

and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist."

**§ 850. Exceptions to rule—When witness called to contradict another.**—The authorities are not in accord as to whether leading interrogatories may be asked where one witness is called to contradict another witness. The better rule would seem to be that counsel should be permitted to ask whether the particular expressions in question were used, or such things said, instead of asking the witness what was said.<sup>51</sup>

**§ 851. Whether or not on cross-examination.**—On cross-examination it may be stated generally that the adverse party may put leading interrogatories to the witness, since it is assumed he is adverse to the party against whom he has been called to testify.<sup>52</sup> A judge may, however, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say that whatever is most favorable to that party. The witness may have purposely concealed such bias, in favor of one party, to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case. This discretionary power to vary the general rule is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case.<sup>53</sup>

There is a diversity of opinion as to whether, as a general rule, the cross-examining party is prohibited from putting a leading question as to a matter proper for cross-examination but not specifically inquired of by the party calling him, on his examination-in-chief. The weight of authority is in favor of the right to put leading questions,

<sup>51</sup> *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 310; *People v. Ah Yute*, 60 Cal. 95; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618; *Norton v. Parsons*, 67 Vt. 523, 32 Atl. 481; *Rounds v. State*, 57 Wis. 45, 53; *Gunter v. Watson*, 4 Jones (N. C.) 455. Contra: *Wood v. State*, 31 Fla. 221; *Allen v. State*, 28 Ga. 396.

<sup>52</sup> *United States v. Dickirson*, 2

*McLean* (U. S.) 325, 331; *Harrison v. Rowan*, 3 Wash. C. C. 580, 582; *State v. Benner*, 64 Me. 267, 279; *Parkin v. Moon*, 7 C. & P. 409. But see *Seven Bishop's Trial*, 12 How. St. Tr. 183, 310; *Anon*, 1 Lew. Cr. C. 322. See Chapter XLI on Cross-Examination.

<sup>53</sup> *Moody v. Rowell*, 17 Pick. (Mass.) 490.

under the circumstances stated, in jurisdictions in which the cross-examiner may inquire into the general subject. It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter, or to matter already examined in chief. The general rule is that, on cross-examination, leading questions may be put, and it would not be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice, in the investigation of the truth of facts; that it would often be difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the court, where the circumstances are such as to require its interposition.<sup>54</sup>

**§ 852. Harmless allowance of leading question.**—A judgment will not be reversed merely because it appears that a leading question was allowed.<sup>55</sup> It must be shown that the court's discretion was abused, and that the complaining party was harmed or prejudiced.<sup>56</sup> It has been held harmless where the matter inquired about is immaterial<sup>57</sup> or where the same facts have been obtained from the same witness upon other questions which were put in proper form.<sup>58</sup> So, if a leading question is asked on direct examination, and later on cross-examination the same question is asked, a judgment will not be reversed.<sup>59</sup>

**§ 853. Court may ask.**—The judge may ask a leading question,

<sup>54</sup> *Moody v. Rowell*, 17 Pick. (Mass.) 490. And so *Beal v. Nichols*, 2 Gray (Mass.) 262; *Ireland v. Railroad Co.* 79 Mich. 163, 44 N. W. 426; *State v. Soper*, 148 Mo. 217, 235, 49 S. W. 1007; *Kibles v. McIlwain*, 16 S. Car. 551; *State v. McGee*, 55 S. Car. 247, 33 S. E. 353. But see 2 *Elliott's Gen. Pr.* § 654. See generally Ch. XLI on Cross-Examination.

<sup>55</sup> *Lillard v. State*, 151 Ind. 322, 50 N. E. 383.

<sup>56</sup> *Goudy v. Werbe*, 117 Ind. 154, 167, 19 N. E. 164; *Board v. Dombke*,

94 Ind. 72; *Snyder v. Snyder*, 50 Ind. 492, and authorities cited in following notes.

<sup>57</sup> *Tredway v. Antisdel*, 86 Mich. 82, 48 N. W. 956.

<sup>58</sup> *Birely v. Staley*, 5 Gill & J. (Md.) 432; *People v. Fong Ah Sing*, 70 Cal. 8, 12, 11 Pac. 323; *Tift v. Jones*, 77 Ga. 181; *State v. Fontenot*, 48 La. Ann. 220, 19 So. 112; *Brice v. Miller*, 35 S. Car. 537, 15 S. E. 272.

<sup>59</sup> *Fox v. Steever*, 156 Ill. 622, 40 N. E. 942.

since he is neutral, and no harm can ordinarily happen to either party.<sup>60</sup> But while, as elsewhere shown, it is well settled that it is within the discretion of the court to interrogate witnesses, and while this practice seems to have been approved in several cases, even where leading questions were asked, it is a practice which, it seems to us, should not be too freely or incautiously indulged.

<sup>60</sup> *Epps v. State*, 19 Ga. 102, 111; *Cauble*, 86 Ind. 591; *De Ford v. Dunn v. People*, 172 Ill. 582, 50 N. Painter, 3 Okla. 80, 41 Pac. 96, 30 E. 137; *Commonwealth v. Galavan*, L. R. A. 722.  
9 *Allen (Mass.)* 272; *Huffman v.*

## CHAPTER XXXIX.

### REFRESHING THE MEMORY.

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|--|--|
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§ 854. **Meaning of term.**—By refreshing the memory of a witness is meant assisting his recollection of certain facts or matters, usually

by means of some written or printed memoranda, document or papers.<sup>1</sup> The recollection may be past recollection or present recollection. If, by the assistance of such things as those above indicated the recollection of the witness can be so stimulated and refreshed as to make it a distinct and actual present recollection, there is little difficulty in the subject, but if his recollection is simply a past recollection, that cannot be stimulated and revived, there is more difficulty, although even then, if a record was made when he had such recollection and knowledge, it may be sufficient under certain conditions.

§ 855. **The rule.**—A witness may, under proper circumstances, have his memory, concerning anything upon which he is examined, refreshed by means of some written or printed matter.<sup>2</sup> Generally speaking, the witness may refresh his memory by referring to any memoranda, the facts stated in which he knew to be correctly written or printed.<sup>3</sup>

<sup>1</sup> Commonwealth v. Ford, 130 Mass. 64, 39 Am. R. 426. As to the general subject see notes, 15 Am. Dec. 194-198, 98 Am. Dec. 619-623; also articles, 23 Cent. Law Jour. 53, 26 Cent. Law Jour. 311.

<sup>2</sup> White v. Tucker, 9 Iowa, 100; Commonwealth v. Ford, 130 Mass. 64, 39 Am. R. 426; State v. Lyon, 89 N. Car. 568; State v. Taylor, 3 Ore. 10; Prather v. Pritchard, 26 Ind. 65; Reg. v. Langton, 2 Q. B. Div. 296; White v. Tucker, 9 Iowa, 100; State v. Lyon, 89 N. Car. 568; Ramsey v. Duke, 1 Mom. (Iowa) 385; Nichols v. White, 41 Hun (N. Y.) 152; Flint v. Kennedy, 33 Fed. 820; Watrous v. Cunningham, 71 Cal. 30; Sanders v. Hutchinson, 26 Ill. App. 633; Billingslea v. State, 85 Ala. 323; Sanders v. Wakefield, 41 Kans. 11; White v. State, 18 Tex. App. 57; Rippe v. Chicago, &c. R. Co. 23 Minn. 18.

<sup>3</sup> Chapin v. Lapham, 20 Pick. (Mass.) 467; Atkins v. State, 16 Ark. 568; Barney v. Ball, 24 Ga. 505; Treadwell v. Wells, 4 Cal. 260; Chiappella v. Brown, 14 La. Ann. 189; Jones v. Johns, 2 Cranch (C.

C.) 426; Massey v. Hackett, 12 La. Ann. 54; Prather v. Pritchard, 26 Ind. 65; Welcome v. Batchelder, 23 Me. 85.

"The law as to the use of memoranda by witnesses while testifying is quite well settled in this state (New York). 1. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has been thus refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not

**§ 856. Reason for the rule.**—Human memory is so weak and treacherous at times that it is often impossible for a witness to tell what was once very familiar to him without some stimulus to his recollection. To aid this frailty of the memory papers or memoranda may be referred to as a stimulus. This is often absolutely necessary in cases where a great number of accounts or entries are the subject of inquiry.<sup>4</sup>

**§ 857. Advantages and disadvantages of the rule.**—If this means of stimulating the recollection were not permitted it would frequently happen that a witness could not give accurate and complete testimony, and thus the very object of the trial might be defeated. A disadvantage is that bad faith is given time to think, for while the witness

precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important, or he may allow the witness to testify

quite generally to the items and their values, and receive the memorandum as the detailed result of his examination. Without the use of a memorandum in such cases it would be difficult, if not impossible, to conduct a trial involving the examination of a large number of items." *Howard v. McDonough*, 77 N. Y. 592. He may refresh his recollection by reference to a published article written by him from notes of a conversation held by him with the defendant, and which he swears contains the substance of what the defendant stated, the notes having been destroyed. *Hawes v. State*, 88 Ala. 37, 57.

<sup>4</sup>*Lawson v. Glass*, 6 Colo. 134; *Howard v. McDonough*, 77 N. Y. 592; *Driggs v. Smith*, 36 N. Y. Super. 283; *Commonwealth v. Ford*, 130 Mass. 64; *Flower v. Downs*, 6 La. Ann. 539; *Cooper v. State*, 59 Miss. 267; *Clough v. State*, 7 Neb. 320; *Kent v. Mason*, 1 Bradw. (Ill. App.) 466; *Rambert v. Cohen*, 4 Esp. 213; *McCausland v. Ralston*, 12 Nev. 196; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *State v. Miller*, 53 Iowa, 154; *Davidson v. Lalande*, 12 La. Ann. 826; *Commonwealth v. Jeffs*, 132 Mass. 5; Mc-

is given time to consult notes it hinders a lively and quick examination, and consequently the answers may not be prompt and unpremeditated. But, as shown in the last preceding section, it is better that such assistance should be allowed, for otherwise not many witnesses would be able to give testimony as to dates, numbers, quantities and sums after the lapse of considerable time.<sup>5</sup>

§ 858. **Court may compel witness to look.**—In some cases it has been held that a witness may be compelled to look at papers and memoranda in his own custody or under his control. In one case upholding this rule it is stated: "There may be cases, undoubtedly, in which it would be a great hardship upon a witness to require him to qualify himself, so to speak, to testify by reference to papers and documents in his power; as when it would subject him to much trouble or expense, or involve any breach of confidence of duty or of honorary obligations, or unreasonably disclose a knowledge of his own affairs. But there are other cases where it would lead to an entire perversion and frustration of the purposes of justice if a witness could not be required to refresh his memory and prepare himself to testify by an examination of papers in his own custody or power, or when they are produced at the trial. . . . Suppose these witnesses, from malice or caprice, or, still worse, from a desire to favor the adverse party, should refuse to examine their memoranda; the rights of life, liberty, property, or reputation, public and political, as well as private, civil and social rights, might be affected and put in jeopardy. It would hardly be going beyond the principle contended for, to say that an attesting witness called to prove a will or deed, if he chose to close his eyes and refuse to look at the instrument, might not be required to look at it, and thus qualify himself to say whether he attested it or not."<sup>6</sup>

It is usually within the discretion of the trial judge to compel a witness to bring in a memorandum which he has under his control.<sup>7</sup>

Cormick v. Railroad Co. 49 N. Y. 303; Wise v. Phoenix, &c. Ins. Co. 101 N. Y. 637; Converse v. Hobbs, 64 N. H. 42; Lawrence v. Stiles, 16 Ill. App. 489; Morris v. Columbian Iron, &c. Co. 76 Md. 354, 25 Atl. 417. A witness called to show a sale and delivery of merchandise may be permitted to look at an approved copy

of an approved account, for the purpose of refreshing his memory. New York, &c. Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665.

<sup>5</sup>Feeter v. Heath, 11 Wend. (N. Y.) 477.

<sup>6</sup>Chapin v. Laphorn, 20 Pick. (Mass.) 467, 472.

<sup>7</sup>Commonwealth v. Lannan, 13 Allen (Mass.) 563.



So it has been held that a witness may be compelled to inspect a memorandum, if there is reason to think that his recollection may be revived.<sup>8</sup> But where the witness suggests no want of memory, and his answers show that he is capable of answering fully, counsel should not be allowed to lead him by placing at his disposal a paper or memorandum under the pretext of refreshing his memory.<sup>9</sup> Only when the memory needs aid may memoranda be resorted to.<sup>10</sup>

**§ 859. Classes of cases where writings allowed.**—Text writers and the courts generally refer to three classes of cases in which writings are allowed to be used to refresh the recollection of a witness: (1) Where the writing is used only for the purpose of assisting the memory of the witness; (2) where the witness recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct;<sup>11</sup> (3) where the writing in question is not recognized by the witness as one which he remembers to have seen before, and does not awaken his memory to the recollection of anything contained in it; but, nevertheless, knowing the writ-

<sup>8</sup> *State v. Staton*, 114 N. Car. 813, 19 S. E. 96; *Chapin v. Laphorn*, 20 Pick. (Mass.) 467.

<sup>9</sup> *Young v. Catlett*, 6 Duer (N. Y.) 437; *Sachett v. Spencer*, 29 Barb. (N. Y.) 180. But this has been held harmless where the witness had made the memorandum himself. *Chute v. State*, 19 Minn. 271.

<sup>10</sup> *State v. Baldwin*, 36 Kans. 1, 12 Pac. 318; *Haack v. Fearing*, 5 Robt. (N. Y.) 528; *Young v. Catlett*, 6 Duer (N. Y.) 437; *Moore v. Chesley*, 17 N. H. 151; *Wightman v. Overhuser*, 8 Daly (N. Y.) 282. See, also, *Sage v. State*, 127 Ind. 15, 26 N. E. 667.

<sup>11</sup> The first proposition to the effect that a witness may thus have his present recollection refreshed so as to testify to the fact from such independent recollection, as thus refreshed is practically unquestioned by any respectable authority. In support of the second

proposition see *Welch v. Greene*, 24 R. I. 515, 54 Atl. 54, and authorities cited; *Erie Preserving Co. v. Miller*, 52 Conn. 444, 52 Am. R. 607; *State v. Collins*, 15 S. Car. 373, 40 Am. R. 697; *Folsom v. Log Driving Co.* 41 Wis. 602; *State v. Lull*, 37 Me. 246; *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *Coffin v. Vincent*, 12 Cush. (Mass.) 98; *Lawson v. Glass*, 6 Colo. 134; *Cowles v. State*, 50 Ala. 454; *Guy v. Mead*, 22 N. Y. 462; *Taft v. Little* (N. Y.), 70 N. E. 211. But a witness must, ordinarily, have either a present or past recollection, and cannot gain his information originally from the memorandum and testify entirely from it. *Erie Preserving Co. v. Miller*, 52 Conn. 444, 52 Am. R. 607; *Jaques v. Horton*, 76 Ala. 239, 243; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Miller v. Preble*, 142 Ind. 632, 42 N. E. 220.

ing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively as to the fact.<sup>12</sup> But it seems that the last proposition is too broadly stated and is not fully supported by the authorities. It certainly cannot be correct in principle to permit a witness, under all circumstances at least, to give his opinion or supposition that a fact exists merely because it is stated in a document which he may be convinced is genuine, when he remembers nothing as to the facts stated, and does not even remember to have seen the document before. It might be mere hearsay, and there would be no fair opportunity to cross-examine as to the actual fact; and so, too, it would often be to allow the opinion or conclusion of the witness to go to the jury when, if the matter were admissible at all, they could draw the conclusion as well as the witness. So far as the proposition is good law it appears that the subject is covered in the main by the second proposition. The authorities cited in its support, to any greater extent, at least, are mostly cases in which the memoranda were made in the usual course of business or the witness recognized his own signature, or the like; so that it may be said that the documents, taken in connection with the circumstances, afforded some evidence of the facts stated.<sup>13</sup>

**§ 860. Illustrations of writings permitted to be used.**—Some illustrations of writings or memoranda permitted to be used are the following: a ledger account,<sup>14</sup> the stub of a cash book,<sup>15</sup> an account of sales kept at an auction,<sup>16</sup> books of account,<sup>17</sup> a copy of an itemized

<sup>12</sup> 1 Greenleaf Ev. § 437; 1 Starkie Ev. 154, 155. See, also, *Martin v. Good*, 14 Md. 398; *Merrill v. Ithaca, &c. R. Co.* 16 Wend. (N. Y.) 586; *Haven v. Wendell*, 11 N. H. 112; *State v. Rawls*, 2 Nott & McC. (S. Car.) 331; *Mattocks v. Lyman*, 16 Vt. 113; *Davis v. Field*, 56 Vt. 426; *Dugan v. Mahoney*, 11 Allen (Mass.) 572; *Alvord v. Collins*, 20 Pick. (Mass.) 418; *Leonard v. Nixon*, 96 Ga. 239, 23 S. E. 80; *Morris v. Sargent*, 18 Iowa, 90, 95; *Rex v. St. Martin's Leicester*, 2 Ad. & El. 210; *Maugham v. Hubbard*, 8 B. & C. 14, 16; *Topham v. McGregor*, 1 Car. & Kir. 320; *Burling v. Paterson*, 9 Carr. & P. 570.

<sup>13</sup> As tending to support the statement that the proposition is too

broad, see *Pingree v. Johnson*, 69 Vt. 225; *Hematitic, &c. Co. v. East Tenn. &c. R. Co.* 92 Ga. 268, 272, 18 S. E. 24; *Costello v. Crowell*, 133 Mass. 352; *Cobb v. Boston*, 109 Mass. 438, 444. There are many old decisions that might also be cited, but they go too far, contrary to the modern tendency, in holding that there must be an actual present recollection, after the memory is so refreshed.

<sup>14</sup> *Columbia v. Harrison*, 2 Mill's Const. (S. Car.) 213.

<sup>15</sup> *Riordan v. Guggerty*, 74 Iowa, 688, 39 N. W. 107.

<sup>16</sup> *Cowles v. Hayes*, 71 N. Car. 230.

<sup>17</sup> *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250.

account,<sup>18</sup> memoranda of payments in a private cash book,<sup>19</sup> bills of particulars of articles furnished, including such items as dates, weights and prices,<sup>20</sup> and stenographic notes.<sup>21</sup>

Other illustrations of memoranda permitted to be used are: letters,<sup>22</sup> a list of goods lost in a fire in an action on an insurance policy,<sup>23</sup> schedule of stolen goods made by a clerk under the direction of the witness,<sup>24</sup> way bills in a freight office,<sup>25</sup> the notes of a stenographer when he is a witness,<sup>26</sup> a statement made by a party to the witness, taken down at the time,<sup>27</sup> memoranda made by an officer showing how he served process,<sup>28</sup> bills of exception as to former testimony;<sup>29</sup> and some courts hold that a former affidavit or deposition may be referred to.<sup>30</sup>

§ 861. **Whether memorandum must be contemporaneous with recorded fact—In general.**—No definite rule can be laid down as to when the memorandum should be written or as to how nearly contemporaneous with the fact or facts recorded the memorandum must be, for a memorandum written at one time might aid the memory of one but be no aid to another. In other words, a memorandum made long after the fact, may be to some witnesses of much greater use than even a contemporaneous memorandum will be to others. It follows that very much must depend upon the circumstances of each case, the character of the witness, and the court's discretion, and consequently it should not be stated as a general rule that a memorandum should

<sup>18</sup> *New York, &c. Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665; *Mead v. White* (Pa.), 8 Atl. 913.

<sup>19</sup> *Converse v. Hobbs*, 64 N. H. 42.

<sup>20</sup> *Avery v. Knight*, 99 Mich. 311; *Rohrig v. Pearson*, 15 Colo. 127; *International R. Co. v. Blanton*, 63 Tex. 108.

<sup>21</sup> *Miller v. Preble*, 142 Ind. 632; *Burbank v. Dennis*, 101 Cal. 90; *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *State v. George*, 60 Minn. 503, 63 N. W. 100; *Wright v. Wright*, 58 Kans. 525, 50 Pac. 444; note in 81 Am. St. 364, 365.

<sup>22</sup> *Travelers' Ins. Co. v. Shepard*, 85 Ga. 751.

<sup>23</sup> *Wise v. Phoenix Ins. Co.* 101 N. Y. 637; *Stavinow v. Home Ins. Co.* 43 Mo. App. 513; *Johnston v. Far-*

*mers' Fire Ins. Co.* 106 Mich. 96, 64 N. W. 5.

<sup>24</sup> *State v. Lull*, 37 Me. 246.

<sup>25</sup> *Erie Preserving Co. v. Miller*, 52 Conn. 444, 52 Am. R. 607.

<sup>26</sup> *Burbank v. Dennis*, 101 Cal. 90; *State v. Cardóza*, 11 S. Car. 195; *Small v. Poffenbarger*, 32 Neb. 234.

<sup>27</sup> *Hinchman v. Weeks*, 85 Mich. 535.

<sup>28</sup> *McCloskey v. Barr*, 45 Fed. 151.

<sup>29</sup> *Solomon R. Co. v. Jones*, 34 Kans. 443.

<sup>30</sup> *Billingslea v. State*, 85 Ala. 323; *Burney v. Ball*, 24 Ga. 505; *State v. Miller*, 53 Iowa, 154; *White v. State*, 18 Tex. App. 57; *Atkins v. State*, 16 Ark. 568. Contra: See *Morris v. Lachman*, 68 Cal. 109; *Calloway v. Varner*, 77 Ala. 541.

not be used for refreshing the present recollection unless made contemporaneously with the fact which it records, although as to past recollection it should ordinarily appear that the memorandum was made at or about that time.

§ 862. **Whether memorandum must be contemporaneous with recorded fact—The rule.**—The rule, as found in the decided cases, is that the memorandum may and should have been prepared at the time of the fact therein recorded, or soon thereafter, while the facts are still fresh in the memory of the witness.<sup>31</sup> This rule, however, while often stated, and sometimes applied indiscriminately, should, it is submitted, be strictly applied only in reference to past recollection, and not where the witness has an independent present recollection after his memory is refreshed.

§ 863. **Witness must remember.**—The memorandum at the farthest, when present recollection cannot be refreshed, should be made before such a period of time has passed that a presumption would arise that the recollection of the witness had become imperfect. It is held in some cases that, if the witness will swear positively that the

<sup>31</sup> *Commonwealth v. Clancy*, 154 Mass. 128, 27 N. E. 1001; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Converse v. Hobbs*, 64 N. H. 42; *Brown v. Galesbury, &c. Co.* 132 Ill. 648; *Williams v. Wager*, 64 Vt. 326, 24 Atl. 765; *Wise v. Phoenix, &c. Ins. Co.* 101 N. Y. 637; *Baum v. Reay*, 96 Cal. 462; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Rohrig v. Pearson*, 15 Colo. 127, 24 Pac. 1083. Five months after the transaction is too long. *Spring, &c. Co. v. Evans*, 15 Md. 54. Sixteen months is too long. *Swartz v. Chickering*, 58 Md. 290. See generally *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375; *Nicholls v. Webb*, 8 Wheat. (U. S.) 326; *Chaffee v. United States*, 18 Wall. (U. S.) 516; *Morris v. Lachman*, 68 Cal. 109; *People v. Cotta*, 49 Cal. 167. Where a witness made a memorandum of a conversation so recently after its occurrence

that he knows he then recollected it perfectly, and committed it to paper correctly, he may read it to refresh his recollection on his examination. *Kendall v. Stone*, 2 Sandf. (N. Y.) 269. A witness may testify to facts contained in a memorandum, made at or about the time the event or transaction mentioned in it took place, and which the witness swears that he knew to be correct when made, although he has forgotten the facts at the time of the trial. *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. Hudson, &c. R. Co.* 17 N. Y. 134; *State v. Colwell*, 3 R. I. 132; *O'Neale v. Walton*, 1 Rich. (S. Car.) 234; *Mattocks v. Lyman*, 16 Vt. 113. A witness may use memoranda as to dimensions of work done by him, even though he took the dimensions long after he had completed the work. *Ahern v. Boyce*, 26 Mo. App. 558.

memorandum, though made *ex post facto*, was made at a time when he had a perfect recollection of the matters there related, he will in general be permitted to make use of it, though it was made a considerable time after the matters had transpired.<sup>32</sup> So, as already intimated, if the memory of the witness is so refreshed by the document that he not only has a past recollection—or, in other words, that he had a recollection and knowledge that the facts were true when it was made—but also that he has a present recollection of the facts after so refreshing his memory, the better rule is that the document need not be contemporaneous with the event or fact referred to, and that it may be of almost any character,<sup>33</sup> but there are authorities of high standing to the contrary.<sup>34</sup>

**§ 864. Must be no suspicious circumstances.**—Where the memorandum was prepared so long after the occurrences in question as to raise a presumption that the witness did not then distinctly remember the facts, or where the subsequent memorandum is prepared by the witness at the instance of an interested person, or where the memorandum has been remoulded by a party or his attorney, it has been held that he should not be allowed to use it.<sup>35</sup> And papers prepared by others may, under the circumstances of the case, be so subject to suspicion and question as to make their use improper.<sup>36</sup>

**§ 865. Not necessary that memorandum be made by witness—In general.**—It is not necessary that the memorandum referred to by the

<sup>32</sup> Wood v. Cooper, 1 C. & Kir. 645; Johnston v. Farmers', &c. Ins. Co. 106 Mich. 96, 64 N. W. 5.

<sup>33</sup> Bank v. Zorn, 14 S. Car. 444; Folsom v. Log Driving Co. 41 Wis. 602; State v. Kremling, 53 Iowa, 209; Atkins v. State, 16 Ark. 568, 589; Commonwealth v. Burton, 183 Mass. 641, 67 N. E. 419; Commonwealth v. Ford, 130 Mass. 64, 39 Am. R. 426; Huff v. Bennett, 6 N. Y. 337; Taft v. Little (N. Y.), 70 N. E. 211; Wise v. Phoenix, &c. Co. 101 N. Y. 637, 4 N. E. 634; Bigelow v. Hall, 91 N. Y. 145, 147; Lawes v. Reed, 2 Lew. Cr. C. 152, note; Henry v. Lee, 2 Chitty, 124; McNeely v. Duff, 50 Kans. 488; Dunlap v. Berry, 4 Scam (Ill.) 327.

<sup>34</sup> See Steinkeller v. Newton, 9 C. & P. 313; Whitfield v. Aland, 2 C. & K. 1015; Sanders v. Wakefield, 41 Kans. 11, 20 Pac. 518; Paige v. Carter, 64 Cal. 489; Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923. See, also, Maxwell v. Wilkinson, 113 U. S. 657, 5 Sup. Ct. 691; Walker v. State, 117 Ala. 42, 23 So. 149.

<sup>35</sup> Schuyler, &c. Bank v. Bollong, 24 Neb. 821, 825; Spring Garden Ins. Co. v. Evans, 15 Md. 54; Noel's Motion, 3 T. R. (D. & E.) 752; Bergman v. Shoudy, 9 Wash. 331, 37 Pac. 453.

<sup>36</sup> Sayer v. Wagstaff, 5 Beav. 462; Alcock v. Ins. Co. 13 Q. B. 292.

witness should be written by the witness himself, especially where, on seeing it, he has a present recollection of the facts. It may have been written by another, since it is the recollection, and not the memorandum, which is evidence. It is essential, however, that, upon referring to it, his recollection should be so refreshed that he can speak to the facts from memory;<sup>37</sup> that is, after referring to it he should be able to testify from his own recollection, or that he remembered having seen it when his memory as to the facts was still fresh, and that he remembers that when he saw it he knew the matters therein stated to be correct.<sup>38</sup> For, if the witness is unable to recall the fact or the truth of the fact recorded, and the memorandum was made by another, his evidence, so far as it is established by the memorandum, is objectionable, as mere hearsay, it being his inference from what a third person has written.<sup>39</sup>

### § 866. Not necessary that memorandum be made by witness—II-

<sup>37</sup> *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

<sup>38</sup> *Cameron v. Blackman*, 39 Mich. 108; *State v. Lull*, 37 Me. 246; *Bowden v. Spellman*, 59 Ark 251, 27 S. W. 602; *Commonwealth v. Ford*, 130 Mass. 64; *Huckins v. People's, &c. Co.* 31 N. H. 238; *Holmes v. Gayle*, 1 Ala. 517; *Birmingham v. McPoland*, 96 Ala. 363, 11 So. 427; *Vastbinder v. Metcalf*, 3 Ala. 100; *Bank v. Brown*, 1 Dudley (Ga.) 62; *Clark v. State*, 4 Ind. 156; *Owings v. Shannon*, 1 A. K. Marsh. (Ky.) 188; *Huff v. Bennett*, 6 N. Y. 337; *Marcy v. Shults*, 29 N. Y. 346; *Green v. Brown*, 3 Barb. (N. Y.) 119; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Taussig v. Shields*, 26 Mo. App. 318; *Hayden v. Hoxie*, 27 Ill. App. 533; *Laboree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102; *Stubbings v. Dockery*, 80 Wis. 618; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418; *State v. Staton*, 114 N. Car. 813, 816, 19 S. E. 96; *Burrough v. Martin*, 2 Campb. 112; *Henry v. Lee*, 2 Chitty, 124; *Smith v. Morgan*, 2 Moo. & R. 257. But see *State v. Cardoza*, 11 S. Car. 195,

238; *Walker v. State*, 117 Ala. 42, 23 So. 142. In one case it is held that a memorandum cannot be used in evidence to refresh the memory of a witness who did not write it, unless the paper is recognized by the witness as a correct account of the transaction. *Chamberlain v. Sands*, 27 Me. 458. But in another it is said that where the writing is neither recognized by the witness as one which he remembers to have seen before, nor awakens his memory to the recollection of anything contained in it, but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively to the fact, the testimony will be received. *Martin v. Good*, 14 Md. 398. A witness, to refresh his memory, may use a memorandum not made by himself, where, after seeing it, he can recall the facts stated in it, and testify to them as matters of present recollection. *Hill v. State*, 17 Wis. 675.

<sup>39</sup> *Green v. Caulk*, 16 Md. 556. But see ante § 859.

**Illustrations of the rule.**—The following are a few of the many illustrations of instances in which a witness has been allowed to refresh his recollection from memoranda not made by himself: Invoice books, account books, or time books made by others, but referred to by the witness from time to time, or acted on by him and known by him to be correct;<sup>40</sup> notes taken by counsel or other persons at a former trial,<sup>41</sup> or from his own testimony at a previous trial, or from a copy of the same,<sup>42</sup> or from entries made by another under the directions of the witness and in his presence.<sup>43</sup> So, also, where the witness has checked entries made by another person,<sup>44</sup> or has actually seen money paid and a receipt given, or has read a memorandum to a party who has assented to its terms.<sup>45</sup>

§ 867. **Whether witness should swear from recollection of distinct and separate facts.**—There is some conflict as to whether a witness should swear from his recollection of the distinct and separate facts after being refreshed by the memorandum, or to all facts stated in the memorandum which he swears were correctly made, even though he has no separate and distinct recollection of each fact. In a great number of cases it is held that the witness must testify from his distinct recollection of the facts,<sup>46</sup> while in a great many equally respect-

"Hill v. State, 17 Wis. 675, 86 Am. Dec. 736.

"Beaubien v. Cicotte, 12 Mich. 459, 468.

"George v. Joy, 19 N. H. 544.

"State v. Lull, 37 Me. 246; Card v. Foot, 56 Conn. 369; Bowden v. Spellman, 59 Ark. 251; Taft v. Little (N. Y.), 70 N. E. 211.

"Stubbings v. Dockery, 80 Wis. 618, 50 N. W. 775.

"Bolton v. Tomlin, 5 A. & E. 856. For a collection of many cases and instances of the use of memoranda used for refreshing the memory, see Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181, 194; State v. Bacon, 41 Vt. 526, 98 Am. Dec. 616, 619.

"Watts v. Sawyer, 55 N. H. 39; Feeter v. Heath, 11 Wend. (N. Y.) 477; Hill v. State, 17 Wis. 97; Pinschower v. Hawks, 18 Nev. 99;

Cameron v. Blackman, 39 Mich. 108; Lawrence v. Barker, 5 Wend. (N. Y.) 301; Acklen v. Hickman, 63 Ala. 494, 35 Am. R. 54; Maxwell v. Wilkinson, 113 U. S. 656; Memphis, &c. R. Co. v. Maples, 63 Ala. 601; Nolin v. Parmer, 21 Ala. 66; Webster v. Clark, 30 N. H. 245; Murray v. Cunningham, 10 Neb. 167; Crawford v. Branch Bank, 8 Ala. 79; Redden v. Spruance, 4 Harr. (Del.) 217; Key v. Lynn, 4 Litt. (Ky.) 338; Johnson v. Culver, 116 Ind. 278; Cooper v. State, 59 Miss. 267; Howie v. Rea, 75 N. Car. 326. "It is a well-settled rule that a witness may refer to memoranda made by himself or by others, for the purpose of refreshing his memory, but it must be for the sole purpose of refreshing his memory, not for the purpose of gaining entirely original information from them." Erie, &c.

able authorities the opposite view is taken.<sup>47</sup> As before stated, however, the tendency of modern authority is to permit the witness to testify not only where he has a present recollection, but also when he has a past recollection, and is able to guarantee that the record or memorandum represented his recollection and knowledge at the time. In some jurisdictions, however, as already shown, it is held, even where this rule prevails, that the writing should have been made contemporaneously with the transaction which it recites, while the occur-

Co. v. Miller, 52 Conn. 444, 52 Am. R. 607. "The doctrine established by the authorities seems to be that if the witness, after looking at the paper, to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible, notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original or a copy, or an extract, nor whether referred to by the witness in court or elsewhere." Harrison v. Middleton, 11 Gratt. (Va.) 527, 543. Where a witness states that certain facts seem to have transpired from the entries on his docket, but does not say that he has no doubt, from his usual course of making entries, that the entries were truly made and were correct, and the witness has no recollection of the facts, independent of such entries, the evidence is not admissible. Williams v. Kelsey, 6 Ga. 365. A witness may refer to his cash book to refresh his recollection; but after he has sworn positively on the subject, he cannot refer to his cash book to corroborate such testimony. Sackett v. Spencer, 29 Barb. (N. Y.) 180.

<sup>47</sup> Costello v. Crowell, 133 Mass. 352; Bank of Tennessee v. Cowan,

7 Humph. (Tenn.) 70; Shriedley v. State, 23 Ohio St. 130; Halsey v. Sinsebaugh, 15 N. Y. 485; State v. Rawls, 2 Nott & M. (S. Car.) 331, 334; Bank v. Boraef, 1 Rawle (Pa.) 152; Davis v. Field, 56 Vt. 426; Nattocks v. Lyman, 16 Vt. 113; Dugan v. Mahoney, 11 Allen (Mass.) 572; Ely v. Ely, 5 Pa. St. 435; Taylor v. Stringer, 1 Hilt. (N. Y.) 377; Acklen v. Hickman, 63 Ala. 494; Cowles v. State, 50 Ala. 454. Where ship-timber was sold, without being scheduled or set apart from similar timber with which it was mingled, a witness called to identify the timber, who was unable to do it except by a schedule made some months after the sale, and, even with that, having no present recollection of the articles enumerated, was admitted. Glover v. Hunnewell, 6 Pick. (Mass.) 222. The old rule, that the witness must be able to swear from memory, is exploded, and all that is now required is, that the witness shall be able to state that the memorandum is correct; he may then read it. Downer v. Rowell, 24 Vt. 343. A witness may hold the memoranda while testifying, and testify to the facts therein stated, even though without the aid of the memoranda he does not remember the facts. Lipscomb v. Lyon, 19 Neb. 511.



rences were fresh in the recollection,<sup>48</sup> and that the memorandum should be an original and not a copy.<sup>49</sup>

§ 868. When memorandum need not be produced in court. If a witness, before going into court, has his memory refreshed by referring to a memorandum in his possession, it is not necessary that the memorandum be brought into court, because the witness in such case really makes a statement from memory.<sup>50</sup> The fact that the writing is not produced may, however, affect the weight of the testimony. And in those cases where the memorandum does not have the effect of reviving the memory of the witness, and the witness has no independent recollection of the facts to which he is called to testify, but

<sup>48</sup> *Burrough v. Martin*, 2 Campb. 112; *Sandwell v. Sandwell*, Comb. 445; *Stemkeller v. Newton*, 9 Car. & P. 313; *Davis v. Field*, 56 Vt. 426; *Mattocks v. Lyman*, 16 Vt. 113. See ante §§ 861, 862.

<sup>49</sup> *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375; *Halsey v. Sinsebaugh*, 15 N. Y. 487; *Merrill v. Ithaca, &c. Co.* 16 Wend. (N. Y.) 599; *Bonnett v. Glattfeldt*, 120 Ill. 166; *Jaques v. Horton*, 76 Ala. 238; *Watson v. Miller*, 82 Tex. 279; Contra: *Calloway v. Varner*, 77 Ala. 541; *Wernwag v. Chicago, &c. R. Co.* 20 Mo. App. 473; *Lawson v. Glass*, 6 Colo. 134; *Folsom v. Apple River Co.* 41 Wis. 602; *Finch v. Barclay*, 87 Ga. 393. Copies of recorded deeds are not the best evidence with which to refresh the memory of the maker of the deeds. *Jones v. Jones*, 94 N. Car. 111. Where the original manuscript of an alleged libelous newspaper article was lost, it was held that the person who wrote the same might refresh his memory from the published article. *Clifford v. Drake*, 110 Ill. 135. See *Commonwealth v. Ford*, 130 Mass. 64. Where a party entered his accounts in a small book, and on opening a new book transferred to it the accounts from the small book, it was held in

an action in which he was plaintiff that he could refresh his memory from the new book, the old one being destroyed. *Murray v. Cunningham*, 10 Neb. 167.

<sup>50</sup> *Hamilton v. Rice*, 15 Tex. 382; *Wabash, &c. Canal v. Bledsoe*, 5 Ind. 133; *Burton v. Plummer*, 2 Ad. & E. 341; *Kensington v. Inglis*, 8 East, 273; *State v. Cheek*, 13 Ired. (N. Car.) 114; *Trustees v. Bledsoe*, 5 Ind. 133; *Clough v. State*, 7 Neb. 320; *Adae v. Zangs*, 41 Iowa, 536. To the contrary, *Hall v. Ray*, 18 N. H. 126. In *State v. Collins*, 15 S. Car. 373, 40 Am. R. 697, the court used this language: "Where a memorandum or other writing is referred to by a witness simply to refresh his memory, and it is not proposed to use such memorandum or writing as testimony, but rely entirely upon the recollection of the witness as refreshed by such memorandum or writing, there can be no necessity for producing the same in court, for it may be as in the case of *State v. Cardoza*, 11 S. Car. 195, 239, that the writing resorted to for that purpose is of such a character as to be altogether unintelligible to any one but the witness himself; and yet upon the principle of the association of ideas,

states that the memorandum he holds he once knew to be true and correct, the original memorandum must be produced. It is held that the original memorandum must be produced, so that the trial judge and the jury may determine the reliability of the evidence and there may be the opportunity of cross-examination by the adverse party.<sup>51</sup>

**§ 869. Mode of using memorandum.**—It has frequently been held that the manner of using the memorandum is largely a question for the discretion of the trial judge, and after refreshing his recollection a witness, in a proper case, and under the judge's proper discretion, may keep the memorandum, book or writing while testifying.<sup>52</sup> Where a memorandum is signed with the mark of a witness who is unable to read and write, it may be read over to him to refresh his memory. It is held, in such case, it should not be read over to him in the presence of the jury, but the witness should withdraw with one of the counsel on each side, and have it read over to him by them, without any comment upon the same.<sup>53</sup> In case a person who made a memorandum or writing later becomes blind, the writing or memorandum may be read to him when on the witness stand, in order that his memory may be refreshed.<sup>54</sup>

**§ 870. When copy may be used.**—By the great weight of authority it is no objection that a copy of an original memorandum is used for the purpose of refreshing the memory, if it does, in fact, serve to revive the recollection so that the witness has a perfect memory of the facts.<sup>55</sup> And the better rule is to the effect that the witness may use

it may be quite sufficient to restore the recollection of a fact which had faded from the memory of the witness."

<sup>51</sup> *Adae v. Zangs*, 41 Iowa, 536; *Wernwag v. Chicago, &c. R. Co.* 20 Mo. App. 475; *Watson v. Miller*, 82 Tex. 279, 285, 17 S. W. 1053; *Doe v. Perkins*, 3 T. R. 749.

<sup>52</sup> *Johnson v. Coles*, 21 Minn. 108; *Chapin v. Lapham*, 20 Pick. (Mass.) 467; *Commonwealth v. Lannan*, 13 Allen (Mass.) 563. The manner in which a witness is permitted to refresh his recollection must be left largely to the discretion of the trial judge. *Johnson v. Coles*, 21 Minn. 108.

<sup>53</sup> *Commonwealth v. Fox*, 7 Gray (Mass.) 585.

<sup>54</sup> *Cott v. Howard*, 3 Stark. 3.

<sup>55</sup> *Chicago, &c. R. Co. v. Adler*, 56 Ill. 344; *Filkins v. Baker*, 6 Laws (N. Y.) 516; *Commonwealth v. Ford*, 130 Mass. 64, 39 Am. R. 426; *Clough v. State*, 7 Neb. 320; *George v. Joy*, 19 N. H. 544; *Berry v. Jourdan*, 11 Rich. (S. Car.) 67; *Folsom v. Log Driving Co.* 41 Wis. 602; *Dunlap v. Berry*, 4 Scam. (Ill.) 327; *Lawson v. Glass*, 6 Colo. 134; *Finch v. Barclay*, 87 Ga. 393; *Tanner v. Taylor*, 3 T. R. 754.

a true copy, without being compelled to bring in the original or to account for its absence.<sup>56</sup> But, in some cases, the fact that the original is not produced or accounted for may be considered by the jury in deciding what weight shall be given to his testimony.<sup>57</sup> If a witness, after seeing a memorandum, testifies from his own recollection, it makes no difference whether the writing used is the original or a copy of it, provided it is established as above.<sup>58</sup> But, as stated in a preceding section, there are cases in which the original writing must be produced, and in such cases a copy would not suffice. Those are the cases where the witness has no independent recollection of the facts aside from the memorandum.<sup>59</sup> In such cases, that is, where there is no present recollection of the facts, the original record must generally be produced, unless it is lost or unavailable.

**§ 871. Cross-examination as to writing—Counsel and jury may inspect.**—If the witness, while upon the stand, has the memorandum, he may be cross-examined as to it. This is to enable a test to be made of his recollection and to discover if the memorandum does assist his memory.<sup>60</sup> And counsel and the jury may refer to the memorandum relating to the matter in issue, but the inspection of matters having no connection with the case may be refused by the trial judge.<sup>61</sup>

**§ 872. Use of memoranda as evidence.**—If the witness, after referring to the memorandum, is able to recollect the fact recorded, that

<sup>56</sup> Calloway v. Varner, 77 Ala. 543; Bullock v. Hunter, 44 Md. 416; Harrison v. Middleton, 11 Gratt. (Va.) 527, 544.

<sup>57</sup> Chicago, &c. R. Co. v. Adler, 56 Ill. 344; Davie v. Jones, 68 Me. 393; Calloway v. Varner, 77 Ala. 541.

<sup>58</sup> Harrison v. Middleton, 11 Gratt. (Va.) 527; Hawes v. State, 88 Ala. 37; Anderson v. Imhoff, 34 Neb. 335; George v. Joy, 19 N. H. 544; Erie Preserving Co. v. Miller, 52 Conn. 444; Lawson v. Glass, 6 Colo. 134; Marcy v. Shults, 29 N. Y. 346.

<sup>59</sup> Marcy v. Shults, 29 N. Y. 346; Caldwell v. Bowen, 80 Mich. 382, 45 N. W. 185; Stanwood v. McLellan, 48 Me. 275; Watson v. Walker, 23 N. H. 471, 495; Bonnet v. Glatt-

feldt, 120 Ill. 166, 11 N. E. 250; Adams v. Board, 37 Fla. 266, 20 So. 266; Banking House v. Darr, 139 Mo. 660; Doe v. Perkins, 3 T. R. 749, 754; Horne v. Mackenzie, 5 Cl. & F. 628.

<sup>60</sup> Chute v. State, 19 Minn. 271; Commonwealth v. Haley, 13 Allen (Mass.) 587; Commonwealth v. Ford, 130 Mass. 64, 66; State v. Bacon, 41 Vt. 526, 98 Am. Dec. 616, and note; Smith v. Jackson, 113 Mich. 511, 71 N. W. 843; Gregory v. Tavernor, 6 C. & P. 281.

<sup>61</sup> McKivitt v. Cone, 30 Iowa, 456; Tibbetts v. Sternberg, 66 Barb. (N. Y.) 201; Commonwealth v. Haley, 13 Allen (Mass.) 587; Hardy's Trial, 24 How. St. Tr. 824.

is, if his memory is revived so that he remembers the fact, and can testify to it independently of the memorandum, then the memorandum is not admissible in evidence,<sup>62</sup> unless it is admissible for some other purpose under some other rule. In other words, the memorandum cannot be put in evidence in corroboration of the recollection of the witness.<sup>63</sup> But if the witness, after referring to the memorandum, does not have his memory revived, but swears to the fact recorded not because he remembers it, but because of his confidence that the memorandum is correct, in such case the memorandum is generally held to be admissible in evidence. In such cases the witness cannot testify to an existing knowledge of the fact recorded, independently of the memorandum, but he testifies that, at the time the memorandum was made, he knew it to be correct, and it is held that the oral testimony of the witness, and auxiliary thereto, the original memorandum, are admissible, since they together are the same as the present positive

<sup>62</sup> *Commonwealth v. Jeffs*, 132 Mass. 5; *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. 185; *Vicksburg, &c. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118; *Peck v. Valentine*, 94 N. Y. 569; *Kelsea v. Fletcher*, 48 N. H. 282; *People v. McLaughlin*, 150 N. Y. 365, 392, 44 N. E. 1017.

It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement that proof should be made that the witness who made the memorandum has no recollection of the matters stated therein, independent of the written paper. When he has such recollection, the evidence is inadmissible. *Meacham v. Pell*, 51 Barb. (N. Y.) 65.

In *Acklen v. Hickman*, 63 Ala. 424, 35 Am. R. 54, the court, in discussing the question of refreshing the memory and the production of memoranda, said: A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts

truly, when, after such examination, he can testify to the facts as matter of independent recollection, but the memorandum is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matters of independent recollection, but he can, nevertheless, testify that, at or about the time the memorandum was made, he knew its contents, and he knew them to be correct and true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, the memorandum is not admissible evidence. See, also, *Stahl v. Duluth*, 71 Minn. 341, 74 N. W. 143, 146; *State v. Baldwin*, 36 Kans. 1, 15; *Friendly v. Lee*, 20 Ore. 202, 205, 25 Pac. 396.

<sup>63</sup> *Field v. Thompson*, 119 Mass. 151; *Wightman v. Overhiser*, 8 Daly (N. Y.) 282. See *Selover v. Rexford*, 52 Pa. St. 308; *Socket v. Spencer*, 29 Barb. (N. Y.) 180.

statement of the witness.<sup>64</sup> But such a memorandum is not usually considered as of itself admissible as independent evidence, unless it falls under some other rule of admission, and the general rule, as we have stated it, although supported by the weight of authority, is somewhat questionable on principle.<sup>65</sup>

**§ 873. Refreshing recollection—Without memoranda.**—The discussion of this subject and the citation of authorities thus far relate to the practice of refreshing the memory by means of some writing, record or other memoranda. But a witness's failure to recall important and relevant parts of a conversation, or material items in a given transaction, is frequently encountered where there is an entire absence of any memoranda, writing or document by which the witness may aid his failing memory. A party's witness may prove utterly useless by reason of his inability to recall an important item of evidence, and the case may be sacrificed by reason of a bad memory if the law does

<sup>64</sup> *National Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Kunder v. Smith*, 45 Ill. App. 368; *Jaques v. Horton*, 76 Ala. 238; *Tuttle v. Robinson*, 33 N. H. 104; *Webster v. Clark*, 30 N. H. 245; *Watson v. Walker*, 23 N. H. 471; *Smith v. Lane*, 12 Serg. & R. (Pa.) 80, 84; *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375. (But see *Bates v. Preble* 151 U. S. 149, 14 Sup. Ct. 277); *State v. Jordan*, 110 N. Car. 491, 14 S. E. 752; *Bryan v. Moring*, 94 N. Car. 687; *Mason v. Phelps*, 48 Mich. 126; *Moots v. State*, 21 Ohio St. 653. See, also, *State v. Brady*, 100 Iowa, 191, 69 N. W. 290; *Ruch v. Rock Island*, 97 U. S. 695; *Solomon R. Co. v. Jones*, 34 Kans. 443; *Davis v. Field*, 56 Vt. 426.

A writing, made by a witness at the time of a transaction, for the purpose of stating truly its particulars, is evidence of what it contains, although the witness has forgotten the facts and circumstances. *Seavy v. Dearborn*, 19 N. H. 351; *Mims v. Sturdevant*, 36 Ala. 636.

A witness cannot be allowed to refresh his memory by referring to a memorandum taken from his books, when he cannot testify to the fact in question beyond what is supposed to appear in the books; the books themselves should be produced. *Stanwood v. McLellan*, 48 Me. 275.

<sup>65</sup> See *Welch v. Greene*, 24 R. I. 515, 54 Atl. 54, 57; *Erie v. Preserving Co.* 52 Conn. 444, 52 Am. R. 607, 608; *Commonwealth v. Jeffs*, 132 Mass. 5; *Dugan v. Mahoney*, 11 Allen (Mass.) 572; *Commonwealth v. Fox*, 7 Gray (Mass.) 585; *Rounds v. State*, 57 Wis. 45, 52; *People v. Elyea*, 14 Cal. 144; *Hoffman v. Chicago, &c. R. Co.* 40 Minn. 60, 41 N. W. 301, 302; *Rex v. St. Martins, Leicester*, 2 Ad. & El. 210. See, also, *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959; *Lipscomb v. Lyon*, 19 Neb. 511, 521; *Vinal v. Gilman*, 21 W. Va. 301, 309; *Lightner v. Wilse*, 4 Serg. & R. (Pa.) 203.

not afford ample remedy under such circumstances. However, it is only when the memory needs assistance that resort may be had to any aid. Thus it was held improper for a witness to read a letter for the purpose of refreshing the recollection where it had not been made to appear that there was any infirmity of memory.<sup>66</sup>

**§ 874. Necessity for refreshing memory—How shown.**—Before there can be any exceptions to the rule which prohibits a party from putting leading questions to his own witness, even for the purpose of refreshing his recollection, it must be made to appear that the memory of the witness has been exhausted.<sup>67</sup> By exhausting the memory is evidently meant that it must be made to appear sufficiently, or to the satisfaction of the trial court, that the witness has forgotten some item of evidence. General questions covering the ground should be put to the witness; he should be given every opportunity to state the matter before any suggestions can be made. When it becomes evident that the witness is unable to recall the forgotten matter some final question should be put to him, such as: "Have you now stated to the jury all you remember of the conversation?" or "Have you now given the jury all you remember of this transaction?" If these questions are answered in the negative, leading or suggestive questions may then be asked for the purpose of refreshing the memory, and his attention may then be directed to the particular thing, or to the subject-matter of the conversation.<sup>68</sup>

**§ 875. Purpose of leading questions.**—In the examination of the party's own witness, where it properly appears that the witness has forgotten, the object of the leading question must be for the sole purpose of refreshing the recollection, and not for the purpose of contradicting or impeaching the witness.<sup>69</sup> Nor can he be impeached by calling other witnesses.<sup>70</sup> But the fact that such questions impeach,

<sup>66</sup> *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174.

<sup>67</sup> *Moody v. Rowell*, 34 Mass. (17 Pick.) 490; *State v. Coats*, 174 Mo. 396, 74 S. W. 864; *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089.

<sup>68</sup> *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089; *Hartsfield v. State*, 29 S. W. 777, (Tex. Cr. App.); *Farrell v. City of Boston*, 161 Mass.

106, 36 N. E. 751; *Commonwealth v. Wilson*, 67 Mass. (1 Gray) 337; *Johnson v. Gwinn*, 100 Ind. 466; *Courteen v. Touse*, 1 Campb. 43.

<sup>69</sup> *Louisville, &c. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107.

<sup>70</sup> *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645.

or tend to impeach the witness, does not prevent the application of the rule.<sup>71</sup>

§ 876. **Court's discretion—Refreshing recollection.**—As in many other matters occurring on the trial of cases, the method of refreshing the witness' recollection is within the sound discretion of the trial court.<sup>72</sup> The same rule applies as in all other cases involving the right of a party to put leading questions to his own witness.<sup>73</sup> As stated in one case, the examination or the relaxation of the rule is within the sound discretion of the court, and from the exercise of this discretion there is ordinarily no appeal. But if a party is deprived of the benefit of material testimony to which he is properly entitled, it is a ground of error.<sup>74</sup> The rule, as announced in another case, is that it is within the discretion of the trial court to permit leading questions to be put to a witness, or to have suggested to him names, dates and items, which cannot be significantly pointed to by a general interrogatory, if the witness has exhausted his memory and the purposes of justice require such a course to be taken. The rule must be regulated by the necessities of each case.<sup>75</sup>

§ 877. **Methods of refreshing recollection—Illustrations.**—When the memory of the witness has been exhausted, and the preliminary questions properly put, it is then competent for a party to call the attention of his witness to testimony given by him at a former trial or hearing, for the purpose of refreshing his recollection.<sup>76</sup> It has been held error for the trial court to refuse to permit counsel to read from a prior examination for the purpose of refreshing the witness' recollection, although it might at the same time impeach or tend to impeach the witness.<sup>77</sup> So where a witness was unable to give the Christian

<sup>71</sup> *State v. Coats*, 174 Mo. 396, 74 S. W. 864. See *Battishill v. Humphreys*, 64 Mich. 514; *Stone v. Standard, &c. Ins. Co.* 71 Mich. 81.

<sup>72</sup> *McCoy v. Munro*, 78 N. Y. S. 849; *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107.

<sup>73</sup> See ante §§ 842, 847.

<sup>74</sup> *Gunter v. Watson*, 49 N. Car. (4 Jones) 455; *Hartsfield v. State*, 29 S. W. 777 (Tex. Cr. App.).

<sup>75</sup> *Huckins v. People's, &c. Ins. Co.* 31 N. H. 238; *Cheaney v. Arnold*, 18 Barb. 434; *Lafferty v. State*, 24 S. W. 507 (Tex. Cr. App.).

<sup>76</sup> *State v. Cummins*, 76 Iowa, 133; *Battishill v. Humphreys*, 64 Mich. 514; *People v. O'Neill*, 107 Mich. 556; *Bullard v. Pearsall*, 53 N. Y. 230; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107; *Fitzpatrick v. State*, 37 Tex. Cr. App. 20; *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261.

<sup>77</sup> *State v. Coats*, 174 Mo. 396, 74 S. W. 864; *Thompson v. State*, 99 Ala. 173, 13 So. 753.

names of the members of a firm, but said he could recognize them if he heard them, it was held competent to read the names to the witness from the declaration.<sup>78</sup> Where a witness denied all knowledge of the transaction in controversy, and denied having testified on a former hearing of the case, it was held proper and competent to read from a written statement, purporting to have been made by the witness, for the purpose of refreshing her recollection. The court, at the same time, properly instructed the jury as to the purpose of the examination, and charged them not to consider the contents of the paper as evidence in the case.<sup>79</sup>

**§ 878. Refreshing recollection—Surprise.**—Where a party is surprised at the unexpected and unfavorable testimony of his own witness, he is usually permitted to inquire of the witness in regard to declarations and statements previously made which are inconsistent with the testimony given, for the purpose of refreshing his recollection and inducing him to correct his statement, or to explain any inconsistency; for this purpose his previous declarations or statements may be repeated to him, and he may be required to state whether they were made by him.<sup>80</sup>

**§ 879. Refreshing and strengthening recollection.**—A party is not limited to the naked or unsupported statement of the witness, but if there is some collateral fact or circumstance which aids or strengthens the memory the witness is usually entitled to give it in connection with his statement of the fact. So, for the purpose of refreshing the memory of his own witness, and to enable him to recollect the fact more clearly, a party may call his attention to any pertinent fact or circumstance having relation to the subject under investigation,<sup>81</sup> or to some particular circumstance or statement.<sup>82</sup> Or, where a party's witness has given an ambiguous answer, it is permissible to inquire as to any circumstance or fact that tends to enable him to recollect the fact sought to be proved more clearly and certainly.<sup>83</sup> The witness

<sup>78</sup> *Acerro v. Petroni*, 1 Stark. 80.

<sup>80</sup> *Hurley v. State*, 46 Ohio St. 320,

<sup>79</sup> *Harvey v. State*, 40 Ind. 516.

21 N. E. 645.

Other illustrative cases: *Dillon v. Pinch*, 110 Mich. 149, 67 N. W. 1113; *Johnson v. Ginn*, 100 Ind. 466; *Rosenthal v. Bilger*, 86 Iowa, 246; *Courteen v. Touse*, 1 Campb. 43; *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637; *Ehrisman v. Scott*, 5 Ind. App. 596.

<sup>81</sup> *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261; *Ehrisman v. Scott*, 5 Ind. App. 596, 599, 32 N. E. 867.

<sup>82</sup> *Louisville, &c. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130.

<sup>83</sup> *O'Hagan v. Dillon*, 76 N. Y. 170.



may give such collateral fact if it strengthens his conviction of the truthfulness of the matter related by him.<sup>84</sup>

**§ 880. Refreshing and strengthening recollection—Conversations.**

As stated by one court, the rules of evidence are those of common sense and human experience, and both of these teach us that the retentiveness of a witness' memory, as to a particular fact or incident, is greatly improved where, after seeing or hearing of it, he subsequently converses about it. And for this reason it is always competent for a witness to state that he had a conversation with a third person on the subject matter of his testimony, at a specified time, as a reason for his accurate recollection of the matter about which he has testified.<sup>85</sup> The details of such conversation, of course, cannot be given. As an illustration of this rule, in an action against a railroad company for damages for killing stock, where a witness testified that the whistle was not sounded for the highway crossing near where the injury occurred, it was held proper for the witness to state that his attention was particularly directed to such failure to sound the whistle by a conversation with his son at the time, and in which the son asked the witness why the whistle was not sounded.<sup>86</sup>

<sup>84</sup> Louisville, &c. R. Co. v. Hart,  
2 Ind. App. 130, 28 N. E. 218.

<sup>85</sup> Adams v. Robinson, 65 Ala. 586.

<sup>86</sup> Louisville, &c. R. Co. v. Hart,  
2 Ind. App. 130, 28 N. E. 218.

## CHAPTER XL.

### OBJECTIONS, OFFERS AND EXCEPTIONS.

Sec.	Sec.
881. Importance of objecting to incompetent evidence.	886. Offer of evidence after objection.
882. Objections must be specific.	887. Time of making offer.
883. Objections not sufficiently specific—Illustrative cases.	888. Exception to ruling on objection.
884. Objection where question is proper but answer incompetent.	889. Effect of incompetent evidence—Opening door for adversary—Waiver of objections.
885. Objections where there are several parties.	890. Withdrawing evidence.
	891. Striking out evidence.

§ 881. **Importance of objecting to incompetent evidence.**—It is often of the utmost importance to keep incompetent and inadmissible evidence from the jury, and for this reason, if for no other, an objection should be promptly made to a question that appears to call for inadmissible evidence if it is at all likely to be harmful. But this is not the only reason. As will hereafter appear, if timely objection is not made to the question, the court may generally refuse to strike out a responsive answer, and the right to question the competency of the evidence may be waived or lost by the failure to object at the proper time.<sup>1</sup> An objection is usually the necessary foundation of an excep-

<sup>1</sup> See post § 891; also, *Bailey v. Warner*, 118 Fed. 395; *McCoy v. Munro*, 78 N. Y. S. 849; *Roe v. Bank*, 167 Mo. 406, 67 S. W. 303; *Collin v. Farmers, &c. Ins. Co. (Colo. App.)* 70 Pac. 698; *Garr v. Cranney*, 25 Utah, 193, 70 Pac. 853; *Parker v. City of Ottumwa*, 113 Iowa, 649, 85 N. W. 805; *City of Maysville v. Guilfoyle*, 110 Ky. 670, 62 S. W. 493; *Ft. Worth, &c. R. Co. v. Harlan* (Tex. Civ. App.), 62 S. W. 971.

tion, and essential to save the question for appeal.<sup>2</sup> So, if the evidence, although incompetent, is once admitted without proper objection, it will usually be considered by the court, as well as the jury, along with the other evidence in the case.<sup>3</sup>

§ 882. **Objections must be specific.**—The ground of the objection should be specifically stated.<sup>4</sup> All objections not specified will ordinarily be considered as waived.<sup>5</sup> It seems, however, that such particular-

<sup>2</sup> *Mooney v. Kinsey*, 90 Ind. 33; *Third Ave. R. Co. v. Ebling*, 100 N. Y. 98, 2 N. E. 878; *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. 239; *Collin v. Farmers, &c. Ins. Co. (Colo. App.)*, 70 Pac. 698. The last case cited requires an objection even to a motion to strike out, and holds that an exception is not sufficient; but this application of the general doctrine carries it to an extreme.

<sup>3</sup> *Webb v. Sweeney (Ind. App.)*, 69 N. E. 200; *Bohr v. Neuenschwander*, 120 Ind. 449, 22 N. E. 416; *Healy v. Patterson (Iowa)*, 98 N. W. 576. Thus it has been held that hearsay evidence so admitted may be considered as proof of a fact, the same as if it were competent. *State v. Cranney*, 30 Wash. 594, 71 Pac. 50. See, also, ante Vol. I. § 330.

<sup>4</sup> *Cunningham v. Cochran*, 18 Ala. 479, 52 Am. Dec. 230; *United States v. McMasters*, 4 Wall. (U. S.) 680; *Whitman v. Foley*, 125 N. Y. 651, 660; *Hamilton v. Pearson*, 1 Ind. 540, 50 Am. Dec. 480; *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *McCullough v. Davis*, 108 Ind. 292, 9 N. E. 276; *Evansville, &c. R. Co. v. Fettig*, 130 Ind. 61; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Abbott v. Chaffee*, 83 Mich. 256, 47 N. W. 216; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Smith v. Morrill*, 39 Kans. 665, 18 Pac. 915; *Smith v. McCarthy*, 33 Ill. App.

176; *Babb v. Missouri Univ.* 40 Mo. App. 173; *Christian v. State*, 86 Ga. 430, 12 S. E. 645; *Bulwinkle v. Cramer*, 30 S. Car. 153, 8 S. E. 689; *Henry v. Dean*, 6 Dak. 78; *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247; *Helena v. Albertose*, 8 Mont. 499; *St. Louis, &c. Co. v. Henson*, 58 Fed. 531, citing *Elliott's App. Proc.* §§ 770, 771. Thus it is insufficient merely to state as the ground of objection that the evidence is "immaterial, irrelevant and inadmissible." *Lake Erie, &c. R. Co. v. Parker*, 94 Ind. 91; *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409; *Leet v. Wilson*, 24 Cal. 398; *Voorman v. Voight*, 46 Cal. 392; *Cornell v. Barnes*, 26 Wis. 473. The reasons for the rule are well stated in *Rush v. French*, 1 Ariz. 99; *City of Delphi v. Lowery*, 74 Ind. 520, and *Camden v. Doremus*, 3 How. (U. S.) 515. A general objection, at all events, is not available if the evidence is admissible for any purpose, and the objection, if specific, could have been met and obviated. *Dow v. Merrill*, 65 N. H. 107; *Chicago, &c. R. Co. v. People*, 120 Ill. 667, 12 N. E. 207; *Tozer v. New York, &c. R. Co.* 105 N. Y. 659; *Es-palla v. Richard*, 94 Ala. 159, 10 So. 137; *McCadden v. Lowenstein*, 92 Tenn. 614, 22 S. W. 426; *Snowden v. Pleasant Valley, &c. Co.* 16 Utah, 366, 52 Pac. 599.

<sup>5</sup> *Evanston v. Gunn*, 99 U. S. 660;

ity of objection is not required upon strict cross-examination,<sup>6</sup> and some of the courts have also relaxed the rule where the evidence is incompetent and inadmissible upon its face, so as to disclose clearly the grounds of objection,<sup>7</sup> or is plainly incompetent for any purpose. The particular evidence objected to should be pointed out, as well as the specific ground of objection stated; for, where part of the evidence is admissible and part not, a mere general objection, not distinguishing between the legal and the illegal, will be overruled.<sup>8</sup>

### § 883. Objections not sufficiently specific—Illustrative cases.

As already shown, a general objection that the question calls for evidence that is "irrelevant, immaterial and inadmissible," is generally insufficient.<sup>9</sup> So, of course, is an objection that the question is "not proper."<sup>10</sup> An objection to hypothetical questions "as assuming a lot of facts not proved" is too general.<sup>11</sup> As already shown, the particular

*Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70; *Ohio, &c. R. Co. v. Walker*, 113 Ind. 196; *Bennett v. Gibbons*, 55 Conn. 450, 12 Atl. 99; *People v. Manning*, 48 Cal. 335; *Kansas Pac. R. Co. v. Pointer*, 9 Kans. 620; *Emrich v. Gilber, &c. Co.* 138 Ala. 316, 35 So. 322.

<sup>6</sup> *Stanton Co. v. Canfield*, 10 Neb. 389, 6 N. W. 466; *O'Donnell v. Seegar*, 25 Mich. 367, 372. Nor is an offer usually required in such a case. *Harness v. State*, 57 Ind. 1; *Bedgood v. State*, 115 Ind. 275; *Martin v. Elden*, 32 Ohio St. 282.

<sup>7</sup> This qualification of the rule is criticised in *Elliott's App. Proc.* § 779.

<sup>8</sup> *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212, and note 226; *Beebe v. Bull*, 12 Wend. (N. Y.) 504; *Wallis v. Randall*, 81 N. Y. 164; *Smoot v. Eslava*, 23 Ala. 659, 58 Am. Dec. 310; *Day v. Henry*, 104 Ind. 324, 4 N. E. 44; *City v. Hudson*, 112 Ind. 542; *Jones v. State*, 118 Ind. 39; *Richmond, &c. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Holmes v. Turners Falls Co.* 150

Mass. 535, 23 N. E. 305; *Hammond v. Schiff*, 100 N. Car. 161, 6 S. E. 753; *Powell v. Augusta, &c. R. Co.* 77 Ga. 192, 3 S. E. 757; *St. Louis, &c. R. Co. v. Hendricks*, 48 Ark. 177, 3 Am. St. 220; *Hamilton v. Maxwell*, 133 Ala. 637, 32 So. 13; *Southern R. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013; *Smith v. Duncan*, 181 Mass. 435, 63 N. E. 938; *Western Un. Tel. Co. v. Church (Neb.)*, 90 N. W. 878, 57 L. R. A. 905.

<sup>9</sup> See ante § 822, n. 4; also, *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605; *Ruth v. St. Louis, &c. Co.* 98 Mo. App. 1, 71 S. W. 1055; *Stuart v. Mitchum*, 135 Ala. 546, 33 So. 670; *Mechanics Sav. Bank v. Harding*, 65 Kans. 655, 70 Pac. 655; *Louisville, &c. R. Co. v. Banks (Ala.)*, 31 So. 573. But compare *Coles County v. Messer*, 195 Ill. 540, 63 N. E. 391; *M. Groh's Sons v. Groh*, 177 N. Y. 8, 68 N. W. 992.

<sup>10</sup> *City of San Antonio v. Potter (Tex. Civ. App.)*, 71 S. W. 764.

<sup>11</sup> *Styles v. Village of Decatur*, 131 Mich. 443, 91 N. W. 622.

ground should be stated, and unless the ground stated is sufficient to support the objection, it is not available error to overrule it even though there may be some other ground of objection.<sup>12</sup> Thus, an objection to the examination of a witness as to the contents of a letter, that the letter should be introduced so that the witness could see it and refresh his memory, has been held insufficient to present the point that the letter was the best evidence of its contents.<sup>13</sup> So, objections to the admissibility of testimony do not, ordinarily, go to the competency of the witness.<sup>14</sup>

**§ 884. Objection where question is proper but answer incompetent.**—An objection to a legitimate question does not reach an incompetent answer. The objection, where the question appears to be proper but the answer is incompetent or irrelevant, and inadmissible, should be made to the answer.<sup>15</sup> The proper practice in such a case is to move to strike the answer out.<sup>16</sup> If part of it is competent and part incompetent, the motion should, of course, be limited to so much of the answer as is incompetent.

**§ 885. Objections where there are several parties.**—Where there are several parties, and the evidence is admissible against any of them, the objection and exception must be by the party aggrieved, and not by all.<sup>17</sup> If admitted against the others, he should ask an instruction limiting its effect to them.<sup>18</sup> This is in accordance with the general rule that an objection by a party not entitled to interpose it is of no

<sup>12</sup> *Western U. Tel. Co. v. Church*, (Neb.), 90 N. W. 878, 57 L. R. A. 905; *United Oil Co. v. Roseberry*, 30 Colo. 177, 69 Pac. 588; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482.

<sup>13</sup> *Rice v. Williams* (Colo. App.), 71 Pac. 433.

<sup>14</sup> *United States Leather Co. v. Aldrich*, 78 N. Y. S. 3; *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579; *Hines v. Consolidated Coal, &c. Co.* 29 Ind. App. 563, 64 N. E. 886. But see *Donovan v. Driscoll*, 116 Ia. 339, 90 N. W. 60.

<sup>15</sup> *Gould v. Day*, 94 U. S. 405; *Barnes v. Ingalls*, 39 Ala. 193.

<sup>16</sup> *Jones v. State*, 118 Ind. 39;

*Conway v. State*, 118 Ind. 482, 485; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106; *People v. Wilkinson*, 14 N. Y. S. 827, 60 Hun (N. Y.). 582.

<sup>17</sup> *Black v. Foster*, 28 Barb. (N. Y.) 387; *Consolidated Ice Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799; *Keesling v. Doyle*, 8 Ind. App. 43, 35 N. E. 126. See, also, *Gardner v. Friederich*, 163 N. Y. 568, 57 N. E. 1110.

<sup>18</sup> *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Vannoy v. Klein*, 122 Ind. 416; *Consolidated Ice Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799.

avail.<sup>19</sup> It must be good as to all who join in it, or it will be good as to none.<sup>20</sup>

§ 886. **Offer of evidence after objection.**—If a question be objected to, or a witness challenged as incompetent, a statement of the evidence expected to be elicited may be offered if the court, in its discretion, sees fit to permit it, notwithstanding the presence of the jury.<sup>21</sup> But documentary evidence, if objected to, ought first to be presented to the judge for his ruling before it is read in the presence of the jury,<sup>22</sup> and it is customary and proper for the trial court to require all offers of evidence after objection to be made out of the hearing of the jury.<sup>23</sup> The offer should specifically state the facts which counsel expects to show in answer to the question propounded to the witness.<sup>24</sup> This is proper in order to enable the trial court to determine whether the testimony is competent, and is necessary, where the objection is sustained, to present any question on appeal.<sup>25</sup> It is not error, however, to refuse an offer of oral evidence where the witness is not present, especially if other circumstances indicate that the offer

<sup>19</sup> Carr v. Boone, 108 Ind. 241.

<sup>20</sup> Where evidence is competent as against one of the co-parties it cannot be entirely excluded, although it may be ineffective or incompetent as to others. Taylor v. Deverell, 43 Kans. 469, 23 Pac. 628; Bond v. Nave, 62 Ind. 505; Cowan v. Kinney, 33 Ohio St. 422; Edwards v. Tracy, 62 Pa. St. 374; Whitney v. Ferris, 10 Johns. (N. Y.) 66.

<sup>21</sup> Scripps v. Reilly, 38 Mich. 10; Sievers v. Peters Box, &c. Co. 151 Ind. 642, 50 N. E. 877; Bagley v. Mason, 69 Vt. 175, 37 Atl. 287; Hedlun v. Holy Terror Min. Co. (S. Dak.), 92 N. W. 31.

<sup>22</sup> Philpot v. Taylor, 75 Ill. 309, 312; Keedy v. Newcomer, 1 Md. 241. But see Rogers v. Winch, 76 Ia. 546, 41 N. E. 214.

<sup>23</sup> Omaha, &c. Co. v. Fay, 37 Neb. 68, 55 N. W. 211; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.

<sup>24</sup> Over v. Schiffling, 102 Ind. 191;

Kern v. Bridwell, 119 Ind. 226; Carskadden v. Poorman, 10 Watts (Pa.) 82, 36 Am. Dec. 145; Halley v. Folsom, 1 N. Dak. 325, 48 N. W. 219; Palmer v. McMaster, 10 Mont. 390, 25 Pac. 1056; Johnson v. Merry Mount, &c. Co. 53 Fed. 569; Ladd v. Missouri Coal, &c. Co. 66 Fed. 880.

<sup>25</sup> Mills v. Winter, 94 Ind. 329; Smith v. Gorham, 119 Ind. 436; Scotland Co. v. Hill, 112 U. S. 183, 186; Smethurst v. Independent, &c. Church, 148 Mass. 261; Shillito v. Sampson, 61 Iowa, 40; Haney-Campbell Co. v. Preston, &c. Ass'n, 119 Ia. 188, 93 N. W. 297; State v. Lewis, 20 Nev. 333, 22 Pac. 241; State v. Barker, 43 Kans. 262, 23 Pac. 575; Smith v. Niagara, &c. Co. 60 Vt. 682; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842. But see Bauernschmidt v. Maryland Trust Co. 89 Md. 507, 43 Atl. 790; James T. Hair Co. v. Manly, 102 Ill. App. 570.

is not made in good faith.<sup>26</sup> Where a document is offered generally, without objection, and admitted, the whole instrument, including indorsements thereon properly connected therewith, is deemed in evidence for all proper purposes.<sup>27</sup>

§ 887. **Time of making offer.**—The practice as to the time of making the offer seems to be somewhat unsettled, and varies somewhat in different jurisdictions. An examination of the decided cases shows that in some instances the offer was made immediately after the objection and before any ruling by the court, while in other instances the offer was made immediately after the objection and ruling. No question seems to have been made in many of the decisions as to the propriety of either course. In Indiana, however, the question as to whether the offer must precede the ruling in order to save the matter by exception for the court on appeal has been squarely presented and decided after much consideration, and the rule now is that the offer must be made before the ruling. The only proper practice is to propound the question to the witness, “and, if objection is made, to state to the court what the examiner proposes to prove by the witness’s answer to the question, and then if the objection is sustained, to reserve an exception to the ruling.”<sup>28</sup> The opposite view was taken by the Appellate Court of Indiana in a strongly reasoned opinion,<sup>29</sup> but the decision has since been overruled.<sup>30</sup> The rule does not, however,

<sup>26</sup> *Eschbach v. Hurtt*, 47 Md. 61, 66; *Scotland Co. v. Hill*, 112 U. S. 183, 186; *Mills v. Winter*, 94 Ind. 329; *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 109; *Lewis v. Newton*, 93 Wis. 405, 67 N. W. 724.

<sup>27</sup> *Miles v. Loomis*, 75 N. Y. 288, 31 Am. R. 470; *Brown v. Eaton*, 98 Ind. 591, 595; *Bell v. Keefe*, 12 La. Ann. 340. But this rule may not apply to a complex document where only a part is offered complete in itself, although the opposite party may generally introduce the remaining part. *Marchand v. Coffee*, 23 La. Ann. 442. As to offer of evidence in part admissible and in part inadmissible, see and compare *Brown v. White*, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321,

and *Southern Pac. R. Co. v. Schoer*, 114 Fed. 466, 57 L. R. A. 707. See, also, *Burch v. Swift*, 118 Ga. 931, 45 S. E. 698.

<sup>28</sup> *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762, is the case in which this doctrine is first emphatically announced and reasoned out. Among the cases following it are *Hoover v. Patton*, 158 Ind. 524, 64 N. E. 10; *Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859; *Chicago, &c. R. Co. v. Linn*, 30 Ind. App. 88, 65 N. E. 552. See, also, *Young v. Otto*, 57 Minn. 307, 59 N. W. 199.

<sup>29</sup> *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. 797.

<sup>30</sup> Expressly overruled in *Chicago, &c. R. Co. v. Linn*, 30 Ind. App. 88, 93, 65 N. E. 552.

require an offer to be made on cross-examination, at least under ordinary circumstances, for the cross-examiner is not presumed to know what testimony his adversary's witness will give, and even if he did know, it would often defeat the very purpose of the cross-examination if he were required to make such a statement before the question is answered.<sup>31</sup>

§ 888. **Exception to ruling on objection.**—The party to whom the ruling of the court on an objection is adverse should save an exception at the time.<sup>32</sup> This is necessary in order to present the question upon appeal,<sup>33</sup> and the record should show the specific objection and its grounds, the ruling and the exception.<sup>34</sup> An exception taken by a party to incompetent evidence is not, it seems, waived or cured by his afterwards introducing evidence to the same effect,<sup>35</sup> but there is conflict upon this proposition. The rule requiring an exception, in order

<sup>31</sup> *City of Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. 559; *Heagy v. State*, 85 Ind. 260; *Cunningham v. Austin, &c. R. Co.* 88 Tex. 534, 31 S. W. 629; *Martin v. Elden*, 32 Ohio St. 282; *Burt v. State*, 23 Ohio St. 394. But it is held otherwise in Ohio if he exceeds the limits of a cross-examination and makes the witness his own as to affirmative matter to which the question is directed. *Beau v. Green*, 33 Ohio St. 444.

<sup>32</sup> 3 *Bouvier Inst.* 475, § 3234; 3 *Wait's Pr.* 202. And see *Stewart v. Huntington Bank*, 11 S. & R. (Pa.), 267, 14 Am. Dec. 628; *Reid v. Hawkins*, 46 Ind. 222; *McKnight v. Dunlop*, 5 N. Y. 537, 50 Am. Dec. 370; *Louisville, &c. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

<sup>33</sup> *Letton v. Graves*, 26 Mo. 250; *Jennings v. Prentice*, 39 Mich. 421, 423; *Kleinschmidt v. McAndrews*, 117 U. S. 282; *United States v. Breitling*, 20 How. (U. S.) 252.

<sup>34</sup> *Gates v. Scott*, 123 Ind. 459; *Lawrence v. Commonwealth*, 86 Va. 573, 10 S. E. 840; *Steffy v. People*, 130 Ill. 98, 22 N. E. 861; *Estate of*

*Page*, 57 Cal. 238; *Elliott's App. Proc.* §§ 783, 807. It should also show the question and the answer or offer, with enough of the evidence, where necessary, to show the application of the objection. *Rush v. French*, 1 Ariz. 99, 121; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749. The ruling should also be made a ground of the motion for a new trial in most jurisdictions, and the evidence particularly pointed out. *Harvey v. Osborn*, 55 Ind. 535; *Lake Erie, &c. R. Co. v. Parker*, 94 Ind. 91.

<sup>35</sup> *Worrall v. Parmelee*, 1 N. Y. 519, 49 Am. Dec. 350. And see *Washington, &c. Co. v. McCormick*, 19 Ind. App. 663, 667, 49 N. E. 1085; *Flanigan v. Lampman*, 12 Mich. 58, 3 Am. Law Reg. (N. S.) 183. But compare *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661; *Gaff v. Greer*, 88 Ind. 122; *Carter v. Fischer*, 127 Ala. 52, 28 So. 376. See, also, *Elliott's App. Proc.* § 628. It has been held that a party, upon whose objection evidence admissible for either party has been excluded, will not be heard to complain of



to save the question for review, applies, no matter whether the ruling complained of was in admitting<sup>36</sup> or excluding<sup>37</sup> evidence. And the same is true where the ruling is on a motion to strike out,<sup>38</sup> as well as where it is on an objection to a question or to the admission or exclusion of documentary evidence.

**§ 889. Effect of incompetent evidence—Opening door for adversary—Waver of objections.**—Where incompetent evidence is received without objection, it is not error to admit evidence otherwise irrelevant to meet it,<sup>39</sup> although this cannot generally be demanded as a

the subsequent exclusion of like evidence offered by himself. *Hinton v. Whittaker*, 101 Ind. 344. See, also, *Continental, &c. Bank v. Bank*, 108 Tenn. 374, 68 S. W. 497. But where other undisputed evidence is given, clearly proving the same fact, error in admitting incompetent evidence may be harmless. *Naugle v. State*, 101 Ind. 284; *Morris v. Wells*, 7 N. Y. S. 61, 54 Hun (N. Y.), 634; *McKay v. Riley*, 135 Ill. 586, 26 N. E. 525; *Beard v. First Nat. Bank*, 41 Minn. 153, 43 N. W. 7; *Blake v. Broughton*, 107 N. Car. 220, 12 S. E. 127; *Bradley v. Palen*, 78 Ia. 126, 42 N. W. 623; *Cameron v. White*, 74 Wis. 425, 43 N. W. 155. But this is not always true. *Anderson v. Rome*, 54 N. Y. 334; *Elliott's App. Proc.* § 699, where the authorities are reviewed.

<sup>36</sup> *Rotan v. Stoeber*, 81 Ind. 145; *Hunt v. Jones*, 1 Ind. App. 545, 28 N. E. 98; *Louisville, &c. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Parker v. Ottumwa*, 113 Ia. 649, 85 N. W. 805; *McCullough v. Biedler*, 66 Md. 283, 7 Atl. 454; *Post v. Hartford, &c. R. Co.* 72 Conn. 362, 44 Atl. 547; *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473. But see *Presnell v. Garrison*, 122 N. Car. 595, 597, 29 S. E. 839.

<sup>37</sup> *Souster v. Black*, 87 Ia. 519, 54

N. W. 534; *Chicago, &c. R. Co. v. Mohan*, 187 Ill. 281, 58 N. E. 395; *McGee v. Robbins*, 58 Ind. 463; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183; *Thorne v. Fox*, 67 Md. 67, 8 Atl. 667; *Simpson v. Meyer*, 197 Pa. St. 522, 47 Atl. 868; *Collier v. Jenks*, 19 R. I. 137, 32 Atl. 208, 61 Am. St. 741; *Carle v. De Sota*, 156 Mo. 443, 57 S. W. 113; *Durham v. Atwell* (Tex. Civ. App.), 27 S. W. 316.

<sup>38</sup> *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705; *Ortwein v. Jeffries*, 1 Ind. App. 290, 27 N. E. 570; *Republican Valley R. Co. v. Boyse*, 14 Neb. 130, 15 N. W. 364.

<sup>39</sup> *Sherwood v. Titman*, 55 Pa. St. 77; *Blossom v. Barrett*, 37 N. Y. 434, 438; *Lewis v. Merritt*, 98 N. Y. 206; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Hogan v. Northfield*, 56 Vt. 721; *Gibson v. Lacy*, 87 Ind. 202; *Dinwiddie v. State*, 103 Ind. 101; *Lowe v. Ryan*, 94 Ind. 450. See, also, *Minton v. Underwood, &c. Co.* 79 Wis. 646, 48 N. W. 857; *Little Rock, &c. R. Co. v. Tankersly*, 54 Ark. 25, 14 S. W. 1099. But compare *Mitchell v. Sellman*, 5 Md. 376; *McCartny v. Nebraska*, 1 Neb. 121; *Lake Roland, &c. R. Co. v. Weir*, 86 Md. 273, 37 Atl. 714.

matter of right.<sup>40</sup> As was said in a recent case: "If a party opens the door to the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened."<sup>41</sup> This is a different thing, however, from the case of a party first objecting to the opening of the door by his adversary, and afterwards following the adversary through, without objection by the latter, with evidence of the same kind or to the same point as that to which he had first unsuccessfully objected as irrelevant and incompetent when it was offered by his adversary. As stated in the last preceding section, it has been held that by so doing he does not necessarily waive his original objection, and this would seem to be the better rule,<sup>42</sup> although the question is not free from doubt.<sup>43</sup> Where he has first opened the door himself he certainly has no right to insist that it shall remain open for his own benefit. It has also been held that a party, by failing to object to incompetent evidence when first introduced, may thereby be precluded from afterwards successfully objecting to evidence of the same character to the same effect, and this rule seems pretty well es-

<sup>40</sup> *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. R. 515; *People v. Dowling*, 84 N. Y. 478, opinion, 486; *Davis v. Keyes*, 112 Mass. 436; *Stringer v. Young*, 3 Pet. (U. S.) 320; *Walkup v. Pratt*, 5 Har. & J. (Md.) 51; *Manning v. Burlington, &c. R. Co.* 64 Ia. 240, 20 N. W. 169. Failure to object to incompetent evidence does not give the right to follow it up with other incompetent evidence even to explain it. *Brand v. Longstreet*, 4 N. J. L. 325; *Trenton, &c. Co. v. Johnson*, 24 N. J. L. 576; *Wilkinson v. Jett*, 7 Leigh (Va.), 115; *Lyons v. Teal*, 28 La. Ann. 592. Compare *Thomson v. Brothers*, 5 La. 277; *Scales v. Shackelford*, 64 Ga. 170; *Wallis v. Randall*, 81 N. Y. 164; *Ward v. Washington Ins. Co.* 6 Bosw. (N. Y.) 229.

<sup>41</sup> *Perkins v. Hayward*, 124 Ind. 445; *Hoover v. State*, 161 Ind. 348, 68 N. E. 591, 592, and authorities there cited.

<sup>42</sup> See *Salt Lake City v. Smith*, 104 Fed. 457, 470, 471; *Church v. Howard*, 79 N. Y. 415; *Worrall v. Parmelee*, 1 N. Y. 519, 49 Am. Dec. 350; *Russ v. Wabash, &c. R. Co.* 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; *Gardner v. St. Louis, &c. R. Co.* 135 Mo. 90, 36 S. W. 214; *Smith v. Sovereign Camp, &c. (Mo.)* 77 S. W. 862.

<sup>43</sup> See *Carter v. Fischer*, 127 Ala. 52, 28 So. 376; *Virginia, &c. Co. v. Fields*, 94 Va. 102, 26 S. E. 426; *Gaff v. Greer*, 88 Ind. 122; *Wheeler v. Moore*, 22 Ind. App. 186, 53 N. E. 426; *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661; *Lewis v. Healey*, 73 Conn. 744, 48 Atl. 212; *Galveston, &c. R. Co. v. Eckles (Tex. Civ. App.)*, 60 S. W. 830. See, also, *Doyle v. Kansas City, &c. R. Co.* 113 Mo. 280, 20 S. W. 970; *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Miller v. Miller*, 92 Va. 510, 23 S. E. 891; *Tacoma, &c. Co. v. Huson*, 13 Wash. 124, 42 Pac. 536.

tablished in many jurisdictions.<sup>44</sup> It seems, however, that it has been carried too far in some instances, and is somewhat questionable as a general rule. An objection, duly made and saved, is not waived by proper cross-examination on the objectionable matter,<sup>45</sup> and it is unnecessary to repeat constantly objections to incompetent evidence in order to prevent a waiver of objections already duly made and preserved.<sup>46</sup>

**§ 890. Withdrawing evidence.**—Where a party introduces evidence over objection and exception, he cannot, as matter of right, have it withdrawn or struck out against the will of the other party;<sup>47</sup> but the court, in the exercise of a sound discretion, may permit such evidence to be withdrawn or struck out, at least where such a course appears to be harmless.<sup>48</sup> The withdrawal may not, however, cure the original error in admitting incompetent evidence. It will often do so,<sup>49</sup> but it is usually necessary for the court also to instruct the jury

<sup>44</sup> *Boston, &c. Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781; *Brice v. Miller*, 35 S. Car. 537, 15 S. E. 272; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *Galveston, &c. R. Co. v. Eckles* (Tex. Civ. App.), 60 S. W. 830; *Bank of Westfield v. Inman*, 8 Ind. App. 239, 34 N. E. 21; *Denver, &c. R. Co. v. Morrison*, 3 Colo. App. 194, 32 Pac. 859; *Shrimpton v. Philbrick*, 530 Minn. 366, 55 N. W. 551. See, also, *Payne v. Miller*, 89 Ga. 73, 14 S. E. 926.

<sup>45</sup> *Peacock v. Gleesen*, 117 Ia. 291, 90 N. W. 610; *Miles v. Chicago, &c. R. Co.* 76 Mo. App. 484.

So, where the objection is to the competency of the witness. *Donnell v. Braden*, 70 Ia. 551, 30 N. W. 777.

<sup>46</sup> *Salt Lake City v. Smith*, 104 Fed. 457; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Church v. Howard*, 79 N. Y. 415; *Griswold v. Edson*, 32 Minn. 436, 21 N. W. 475; *Sharon v. Sharon*,

79 Cal. 633, 22 Pac. 26, 131; *Oppenheimer v. Barr*, 71 Iowa, 625, 32 N. W. 499. But see *Wagner v. Jones*, 77 N. Y. 590; *Bailey v. Ogden*, 75 Ga. 874; *Frost v. Goddard*, 25 Me. 414.

<sup>47</sup> *Furst v. Second Ave. R. Co.* 72 N. Y. 542; *Decker v. Bryant*, 7 Barb. (N. Y.) 182. And see *Erben v. Lorillard*, 19 N. Y. 299; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469.

<sup>48</sup> *State v. Towler*, 13 R. I. 661; *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713; *Boyd v. State*, 17 Ga. 194; *Gray v. Gray*, 3 Litt. (Ky.) 465.

<sup>49</sup> *DuRant v. DuRant*, 36 S. Car. 49, 14 S. E. 929; *State v. Towler*, 13 R. I. 661; *Wright v. Gillespie*, 43 Mo. App. 244; *Hillestad v. Hostetter*, 46 Minn. 393, 49 N. W. 192; *State v. Cummins*, 76 Ia. 133, 40 N. W. 124; *Indianapolis, &c. R. Co. v. Bush*, 101 Ind. 582; *Dillingham v. Russell*, 73 Tex. 47, 3 L. R. A. 634; *Elliott's App. Proc.* Sec. 700.

to disregard such evidence,<sup>50</sup> and even then the error may be fatal where it appears that the objecting party was prejudiced thereby, notwithstanding the instructions of the court.<sup>51</sup>

§ 891. **Striking out evidence.**— One who has permitted evidence incompetent on its face to be received, without objection, is not entitled as of right to have it struck out on motion,<sup>52</sup> but the matter is largely in the discretion of the trial judge, who may, it seems, instruct the jury to disregard it.<sup>53</sup> Where incompetent evidence of a character likely to injure a party is admitted over his objection, on promise to connect, or because apparently competent at the time, a motion to strike it out afterward interposed by him should be sustained.<sup>54</sup> It is the proper way to reach an objectionable answer to a

<sup>50</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Blum v. Jones* (Tex.) 23 S. W. 844; *Waterman v. Chicago, &c. R. Co.* 82 Wis. 613, 52 N. W. 247; *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803; *Rooney v. Milwaukee, &c. Co.* 65 Wis. 397, 399; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *Glenn v. Clore*, 42 Ind. 60.

<sup>51</sup> *McAllister v. Detroit Free Press*, 85 Mich. 453, 48 N. W. 612; *Meyer v. Lewis*, 43 Mo. App. 417; *Erben v. Lorillard*, 19 N. Y. 299; *Pringle v. Leverich*, 97 N. Y. 181, 186; *Howe, &c. Co. v. Rosine*, 87 Ill. 105; *Elliott's App. Proc. Sec.* 699, n. 2.

<sup>52</sup> *Simons v. Vulcan Oil Co.* 61 Pa. St. 202, 100 Am. Dec. 628; *Levin v. Russell*, 42 N. Y. (Hand) 251; *Quin v. Lloyd*, 41 N. Y. 349; *Brockett v. New Jersey Steamboat Co.* 18 Fed. 156; *Le Coulteux De Caumont v. Morgan*, 104 N. Y. 74, 9 N. E. 861, 865; sub nom. *Matter of Morgan*, 104 N. Y. 74; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Newlon v. Tyner*, 128 Ind. 466, 27 N. E. 168; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Campbell v. Conner*, 15 Ind. App. 23, 42 N. E. 688, 43 N.

E. 453; *Falvey v. Jackson*, 132 Ind. 176, 31 N. E. 531; *Bailey v. Warner*, 118 Fed. 395.

<sup>53</sup> *Pontius v. People*, 82 N. Y. 339; *Platner v. Platner*, 78 N. Y. 90. See, also, *Gilmore v. Pittsburg, &c. R. Co.* 104 Pa. St. 275; *In re Lasak's Will*, 131 N. Y. 624, 30 N. E. 112.

<sup>54</sup> *Anderson v. Rome, &c. R. Co.* 54 N. Y. 334; *Gilbert v. Cherry*, 57 Ga. 128; *Landa v. Obert*, 78 Tex. 33. But where capable of being rendered harmless by instructions, it has been held sufficient to instruct the jury to disregard the evidence and not error to overrule the motion to strike out. *Marks v. King*, 64 N. Y. 628; *Gawtry v. Doane*, 51 N. Y. 84; *Northampton Bank v. Balliet*, 8 Watts & S. 311, 42 Am. Dec. 297; *Cadwallader v. Brodie* (Pa.), 13 Atl. 483. See, also, *Blackburn v. Beall*, 21 Md. 208; *Dillin v. People*, 8 Mich. 357. If the court states at the time it is made that the evidence will be excluded unless the connecting evidence is introduced, it has been held that the motion to strike out should be renewed when the connecting evidence is not afterwards

question which is unobjectionable.<sup>55</sup> The motion must, however, where part of the answer is relevant and competent, be confined to the part that is incompetent,<sup>56</sup> and it will not lie where the evidence is relevant and competent as far as it goes, but is insufficient to warrant a recovery.<sup>57</sup> It seems to be within the discretion of the trial court to permit one who has drawn out incompetent evidence from his own witness, without objection, to have it struck out.<sup>58</sup> And the court may, sometimes of its own motion, strike out irrelevant evidence at any proper stage of the trial.<sup>59</sup>

introduced. *Bailey v. Warner*, 118 Fed. 395.

<sup>55</sup> *Kansas Farmers' Ins. Co. v. Hawley*, 46 Kans. 746, 27 Pac. 176; *Conway v. State*, 118 Ind. 482; *Lankford v. State* 144 Ind. 428, 43 N. E. 444; *Jones v. State*, 118 Ind. 39; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106; *Roquest v. Boutin*, 14 La. Ann. 44. Compare *Roberts v. Johnson*, 37 N. Y. S. 157; *Gibson v. Hatchett*, 24 Ala. 201; *Gould v. Day*, 94 U. S. 405, 414. And see *Prentiss v. Strand*, 116 Wis. 647, 93 N. W. 816; *Stillwell v. Patton*, 108 Mo. 352; *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174.

<sup>56</sup> *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70; *Tuomey v. O'Reilly, &c. Co.* 22 N. Y. 930; *Miller v. Windsor Water Co.* 148 Pa. St. 429, 23 Atl. 1132; *Buford v. Shannon*, 95 Ala. 205, 10 So. 263; *Wolfe v. Pugh*, 101 Ind. 293; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 755; *Hopkins v. Modern Woodmen*, 94 Mo. App. 402, 68 S. W. 226.

<sup>57</sup> *Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659, 661; *Harbor v. Morgan*, 4 Ind. 158; *Pedigo v. Grimes*,

113 Ind. 148; *Nokken v. Avery, &c. Co.* 11 N. Dak. 399, 92 N. W. 487. See and compare *Carrico v. West Virginia, &c. R. Co.* 35 W. Va. 389, 14 S. E. 12.

<sup>58</sup> *Carpenter v. Ward*, 30 N. Y. 243, 246; *Farmers' Bank v. Cowan*, 2 Abb. Ct. App. D. 88. It certainly cannot be demanded as a matter of right. *East Tennessee, &c. R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63.

<sup>59</sup> *Monfort v. Rowland*, 11 Stew. (N. J. Eq.) 181; *Maurice v. Worden*, 54 Md. 233, 251; *Price v. Brown*, 98 N. Y. 388; *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389. But see *Gaspar v. Heimbach*, 53 Minn. 414, 55 N. W. 559. And where a defendant unsuccessfully moves to strike out evidence, but the court subsequently offers to sustain the motion, which offer is refused and the motion withdrawn, the defendant cannot complain of appeal of the first ruling upon his motion. *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389. See, also, *Norfolk, &c. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757.

## CHAPTER XLI.

### CROSS-EXAMINATION.

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Sec.		Sec.	
922.	American rule—Where testimony by others on same subject matter.	925.	American rule—What not excluded.
923.	American rule—Where one must make witness his own.	926.	American rule—Rule does not exclude facts that are part of <i>res gestae</i> .
924.	American rule—May rebut or modify inferences or conclusions.	927.	American rule—In discretion of court as to whether brought out on examination-in-chief.

§ 892. **Meaning of term.**—By cross-examination is meant the examination of a witness by the party opposed to the one who produced and examined him in chief. In some jurisdictions, however, as hereafter shown, it has been held that, where a witness has been called and sworn, the opposite party may cross-examine him even though the party who called him may not have chosen to examine him in chief.<sup>1</sup> But this practice does not generally obtain, and such an examination can hardly be said to be in strictness a cross-examination even if it could be carried on under the rules and in the manner of a cross-examination.

§ 893. **The rule.**—After a witness has been called by one party and has given his testimony, the opposite party has a right to cross-examine him.<sup>2</sup>

<sup>1</sup>See 1 Alb. Law Jour. 100; notes in 12 L. R. A. 693, and 15 L. R. A. 669-674.

<sup>2</sup>See notes in 12 L. R. A. 693; 15 L. R. A. 669-674. See article on examination of witnesses at common law, 22 Law R. 577; 27 Cent. Law Jour. 305; 6 Cr. Law Mag. 520; 23 Sol. Jour. & R. 523; 48 Alb. Law Jour. 299.

Anderson v. Walter, 34 Mich. 113; Anderson v. Russell, 34 Mich. 109; Jacobson v. Metzger, 35 Mich. 103; Hyland v. Milner, 99 Ind. 308; Mosier v. Stoll, 119 Ind. 244; Dillard v. Samuels, 25 S. Car. 318; Zucker v. Karpeles, 88 Mich. 413; Aiken v. Cato, 23 Ga. 154; Lunday v. Thomas, 26 Ga. 537; Austin v. State, 14 Ark. 555.

Where a party without his own fault, neglect or consent, lost the opportunity to cross-examine a witness examined by the opposite party, the testimony of such witness given on the direct examination should be stricken out. *Cole v. People*, 2 Lans. (N. Y.) 370.

Before being cross-examined the witness should not be allowed to have his testimony on the direct examination read over to him. Such a request would certainly greatly impair his credibility. *Derby v. Derby*, 21 N. J. Eq. 36.

Where plaintiff has examined the defendant as a witness, defendant has a right on cross-examination to state matters relevant to such examination which

**§ 894. The object.**—The object of a cross-examination is, usually, to sift the evidence, to try the credibility of the witness, and to break or weaken the force of the testimony given by the witness on his direct examination. It is one of the principal tests for discovering the truth. The jury are enabled to have clearly presented to them the powers of discernment and memory of the witness, his relation to the parties, and the matter in litigation, and his demeanor when under the rigid questioning of the adverse party. And so it is very seldom that a witness under the fire of a cross-examination can easily mislead a court or jury. It is difficult for a witness having a false story to take into consideration in his fabrication all the circumstances to which a cross-examination may be extended.

To the end indicated it is proper to show the relations of the witness to the case and the parties, the interest, if any, he may have in the result, and his motives for testifying in any particular manner. Likewise, it is proper to show his relation to the facts, his means of knowledge and opportunities for information, his powers of observation, and his tenacity of memory.<sup>3</sup>

**§ 895. Considered part of evidence of party calling the witness.** The matters brought out legitimately on a cross-examination are to be treated as a part of the evidence of the party calling the witness rather than as evidence that cannot be contradicted by the cross-examining party.<sup>4</sup> But where a cross-examiner calls out matter which operates against him, he will not be heard to object to the admissibility of such evidence,<sup>5</sup> or to the competency of the

tend to help his side of the case. *Reeve v. Dennett*, 141 Mass. 207.

<sup>3</sup>*State v. Kent*, 5 N. Dak. 516, 541, 67 N. W. 1052; *Stevens v. Beach*, 12 Vermont, 585, 36 Am. Dec. 359; *Hyland v. Milner*, 99 Ind. 308; 2 *Elliott's Gen. Pr.* § 620.

"The object of cross-examination is to elicit the whole truth of transactions supposed to have been partially explained; and any question tending to fill up designed or accidental omissions of the witness are proper." *Chandler v. Allison*, 10 Mich. 460. See, also, *The Ottawa*, 3 Wall. (U. S.) 268, 271; *Butler v. Flanders*, 12 Jones & S. 531, 44 N.

Y. Super. Ct. 531; *Bigcraft v. People*, 30 Colo. 298, 70 Pac. 417; *Guerstin v. Town of Hudson*, 71 N. H. 505, 53 Atl. 736.

<sup>4</sup>*Wilson v. Wayar*, 26 Mich. 452; *Gregory v. Nesbit*, 5 Dana (Ky.) 419; *State v. Langdon*, 31 Minn. 316, 17 N. W. 859; *Horner v. Speed*, 2 Patt. & H. (Va.) 616; *Newberry v. Furnival*, 46 How Pr. (N. Y.) 139. But as to collateral matters, not properly cross-examination, the rule is generally different.

<sup>5</sup>*Kelley v. Merrill*, 14 Me. 228; *Boteler v. Beall*, 7 Gill & J. (Md.) 389; *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147; *Tourtelotte v. Brown*,



witness;<sup>6</sup> but this rule does not go so far as to render a prior objection unavailing.

§ 896. **Witness must be sworn in chief.**—If one called as a witness is not examined and not sworn in chief, he is not subject to cross-examination. If he is sworn and gives any evidence the opposite party may cross-examine him, but it is otherwise where he is neither sworn nor examined-in-chief. Thus, where a witness attends a trial for the mere purpose of producing a paper held by him, if he is not even sworn, he cannot be cross-examined.<sup>7</sup>

§ 897. **Rule where witness is sworn but gives no testimony.** There appears to be some lack of harmony in the decided cases as to whether there may be a cross-examination where a witness in chief has been sworn, but the party calling him does not question him. In England it seems that the right to cross-examine exists. Some of the states follow this rule but others hold to the contrary.

According to what seems to be the English rule, if a competent witness is sworn the opposite party may cross-examine him, even though he is not examined-in-chief;<sup>8</sup> not, however, if he is sworn by mistake, and the mistake is discovered before any questions are asked;<sup>9</sup> nor where his examination-in-chief is put an end to by the court after he has been asked an immaterial question.<sup>10</sup> Few of the American courts have gone so far as the English courts, but some of them exhibit a strong tendency at least in that direction.<sup>11</sup> In the majority

1 Colo. App. 408, 29 Pac. 130; Clark v. Clark, 65 N. Car. 655; Moore v. People, 108 Ill. 484; State v. Goodwin, 32 W. Va. 177; St. Louis, &c. Co. v. American, &c. Co. 33 Mo. App. 348.

Where new matter is brought out on the cross-examination, the witness, as to the new matter, becomes the witness of the cross-examiner and may be cross-examined as to such matter by the opposite party. Bassham v. State, 38 Tex. 622.

<sup>6</sup> Bailey v. Cooper, 5 Humph. (Tenn.) 400.

<sup>7</sup> Perry v. Gibson, 1 Ad. & El. 48; Davis v. Dale, 1 M. & M. 514; Reed v. James, 1 Stark. 106; Summers v. Moseley, 2 C. & M. 477.

But see Yost v. Minn. &c. Works, 41 Ill. App. 556.

<sup>8</sup> Rex v. Brooke, 2 Stark. 409; Phillips v. Eamer, 1 Esp. 357; Dickinson v. Shee, 4 Esp. 67.

<sup>9</sup> Clifford v. Hunter, 3 C. & P. 16; Wood v. Mackinson, 2 M. & Rob. 273; Rush v. Smith, 1 C. M. & R. 94.

<sup>10</sup> Creevy v. Carr, 7 C. & P. 64.

<sup>11</sup> Blackington v. Johnson, 126 Mass. 21; State v. Sayers, '58 Mo. 585; Kibler v. McIlwain, 16 S. Car. 550; Linsley v. Lovely, 26 Vt. 123; Com. v. Morgan, 107 Mass. 199; Jackson v. Varick, 7 Cow. (N. Y.) 238; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483; Mask v. State, 32 Miss. 405.

of jurisdictions, however, it is held that under such circumstances the right to cross-examine does not exist.<sup>12</sup>

§ 898. **Witness called solely to prove an attestation.**—In many jurisdictions, where a witness is called for the sole purpose of proving the attestation of a written instrument, or the like, and is examined on the direct examination to that extent only, it is held that this makes him a witness for all purposes, and he may be cross-examined as to the subject matter of the entire case.<sup>13</sup> Many decisions, however, are to the contrary.<sup>14</sup> It would seem that it is going too far to hold that the whole case may be gone into on strict cross-examination under such circumstances,<sup>15</sup> and in some of the authorities cited in support of the right to do so, the cross-examination went only to the identity of the instrument, or other facts concerning it, or to the sanity or capacity of the party executing it.<sup>16</sup> In others it was merely held that an abuse of discretion to the preju-

<sup>12</sup> *Miller v. Miller*, 92 Va. 510; *Bishop v. Averill*, 17 Wash. 209; *Bell v. Chambers*, 38 Ala. 660; *Taggart v. Bosch* (Cal.), 48 Pac. 1092; *Thalheim v. State*, 38 Fla. 169; *Brown v. State*, 28 Ga. 199; *State v. Larkins*, 5 Ida. 200, 47 Pac. 945; *Bonnet v. Glattfeldt*, 120 Ill. 166, 172, 11 N. E. 250; *Johnson v. Wiley*, 74 Ind. 233, 237; *Riordan v. Guggerly*, 74 Iowa, 690; *Lawder v. Henderson*, 36 Kans. 754; *Haynes v. Ledyard*, 33 Mich. 319; *State v. Chamberlain*, 89 Mo. 129, 132; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Buckley v. Buckley*, 12 Nev. 423; *State v. Zellers*, 7 N. J. L. 220, 229; *State v. Kent*, 5 N. Dak. 516, 67 N. W. 1052; *Philadelphia, &c. R. v. Stimpson*, 14 Pet. (U. S.) 448, 461; *Austin v. State*, 14 Ark. 555; *Fulton v. Bank*, 92 Pa. St. 112; *Wendt v. Railroad Co.* 9 S. Dak. 301, 68 N. W. 749.

<sup>13</sup> *Dawson v. Callaway*, 18 Ga. 573; *Aiken v. Cato*, 23 Ga. 154; *Bulen v. Granger*, 56 Mich. 207, 25 N. W. 188; *Page v. Kankey*, 6 Mo. 433; *Butterworth v. Pecare*, 8 Bosw. (N.

Y.) 671; *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Varick v. Jackson*, 2 Wend. (N. Y.) 167; *Jackson v. Varick*, 7 Cow. (N. Y.) 238; *Morgan v. Bridges*, 2 Stark. 279; *Lunday v. Thomas*, 26 Ga. 537; *Blackington v. Johnson*, 126 Mass. 21; *Lamprey v. Munch*, 21 Minn. 329; *Brown v. Burrus*, 8 Mo. 26; *Linsley v. Lovely*, 26 Vt. 123. See, also, *Sands v. Southern R. Co.* 108 Tenn. 1, 64 S. W. 478.

<sup>14</sup> *McFadden v. Mitchell*, 61 Cal. 148; *Monongahela Co. v. Stewartson*, 96 Pa. St. 436; *Ellmaker v. Buckley*, 16 S. & R. (Pa.) 72, 77; *Fulton v. Central Bank*, 92 Pa. St. 112; *Gale v. People*, 26 Mich. 157.

<sup>15</sup> The reasons for our view are well stated by Chief Justice Gibson in *Ellmaker v. Buckley*, 16 S. & R. (Pa.) 72, 77.

<sup>16</sup> See *Bulen v. Granger*, 56 Mich. 207, 25 N. W. 188; *Egbert v. Egbert*, 71 Pa. St. 326; *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112; *Berry v. Safe Deposit, &c. Co.* 96 Md. 45, 53 Atl. 720; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

dice of the complaining party was not shown. The cross-examination should, we think, be permitted to extend beyond the mere immediate question of the execution of the instrument, but not to entirely different issues or subjects. In applying the rules as to what questions may be gone into on cross-examination, the courts have allowed a great variety of different questions to be asked.<sup>17</sup>

**§ 899. What may be inquired into — In general.**—The questions put on strict cross-examination must generally tend to rebut, impeach, modify, explain, or in some way qualify the statements made by the

<sup>17</sup> A witness may be asked why he visited a certain place which he testified on direct examination to have visited. *Dance v. McBride*, 43 Iowa, 624; *Thomasson v. Dill*, 30 Ala. 414; *State v. Hartnett*, 75 Mo. 251.

The witness may be asked his state of feelings toward the parties. *Bullard v. Lambert*, 40 Ala. 204; *Ray v. Bell*, 24 Ill. 444; *Blessing v. Hape*, 8 Md. 31.

As to whether he was intoxicated at the time referred to. *Pool v. Pool*, 33 Ala. 145. See *Batten v. State*, 80 Ind. 394.

Where a witness in his direct examination had testified that a certain person was reputed to be a man of large property, counsel were permitted, in cross-examination, to ask in what such property was reputed to consist. *United States v. Flowery*, 1 Sprague (U. S.) 109.

Where the district attorney is assisted by other counsel in a criminal case, the defendant's counsel may ask the prosecuting witness whether he employed such counsel. *People v. Blackwell*, 27 Cal. 65.

A witness may be cross-examined as to prior conversations with third persons, which tend to show ill-will on his part toward the

party against whom he is testifying, both for the purpose of, in this manner, affecting his credibility, and also of laying the foundation for the contradiction of his testimony. *Powell v. Martin*, 10 Iowa, 568; *Newcomb v. State*, 37 Miss. 383; *Newton v. Harris*, 6 N. Y. 845.

Where plaintiff testified that he was a farmer, it was proper on cross-examination, to ask him how much land he owned. *Field v. Davis*, 27 Kans. 400.

The question to a witness for the prosecution, on cross-examination, "whether the witness had stated to A, B, or C that he was coming to Washington to see the prisoner hung," should not be rejected as an improper one. *Bixby v. State*, 15 Ark. 395.

A witness called by the accused on the trial of an indictment for an assault, was asked on cross-examination by the prosecution whether he was on good terms with Mrs. B., the party assaulted. Held that this inquiry was inadmissible, Mrs. B. being merely a witness in the case, and having no interest in it which the law could recognize. *State v. Alford*, 31 Conn. 40.

Where a witness was asked on direct examination if he had not left home to keep from testifying

witness on his examination-in-chief.<sup>18</sup> But, as hereafter shown, the cross-examination is not always required to be confined to the exact phase of the particular subject concerning which the witness testified on examination-in-chief, nor, in some jurisdictions, is it always confined to the same subject.

**§ 900. What may be inquired into—Questions tending to degrade.**

It has been held that a party has no right, upon a cross-examination, to ask a witness any question tending to degrade or humiliate him, unless

in a suit, it is competent on cross-examination to ask him if he did not leave home for some other reason. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504.

In an action for damages caused by an assault made on the plaintiff by the defendant, the question, "How many rows have you had within five or six years," was held to be improper on cross-examination. *Depan v. Wallace*, 18 N. Y. S. 274.

A plaintiff in a damage suit growing out of personal injuries, cannot be asked, on cross-examination, if he had not offered to waive any claim for a certain consideration. *Monongahela Co. v. Stewartson*, 96 Pa. St. 436.

<sup>18</sup>*State v. Perkins*, 66 N. Car. 126; *Cornelius v. Commonwealth*, 15 B. Mon. (Ky.) 539; *Tate v. State*, 86 Ala. 33; *Damon v. Weston*, 77 Iowa, 259; *Graham v. McReynolds*, 88 Tenn. 240; *Black v. Wabash, &c. R. Co.* 111 Ill. 351; *Holmes v. State*, 88 Ala. 26; *People v. Cline*, 83 Cal. 374; *Da Lee v. Blackburn*, 11 Kans. 190; *Haynes v. Ledyard*, 33 Mich. 319; *Sumner v. Blair*, 9 Kans. 521; *Phillips v. Elwell*, 14 Ohio St. 240; *Baird v. Daly*, 68 N. Y. 547; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080; *State v. Adams*, 108 Mo. Sup. 208, 18 S. W. 1000; *Jasper*

*v. Lano*, 17 Minn. 296; *Connecticut, &c. Co. v. Ellis*, 89 Ill. 516; *McFadden v. Mitchell*, 61 Cal. 148; *Oldershaw v. Knowles*, 101 Ill. 117; *Jackson v. Mate*, 78 Ala. 471.

The cross-examiner should be allowed free range within the limits of the subject matter brought out on the direct examination. *Ferguson v. Rutherford*, 7 Nev. 385; *Buckley v. Buckley*, 12 Nev. 423.

Thus, where a witness on the direct examination has stated part only of a conversation, the cross-examining party may require him to state the entire conversation. *People v. Smallman*, 55 Cal. 185; *Metzer v. State*, 39 Ind. 596; *People v. Strong*, 30 Cal. 151; *Phares v. Barber*, 61 Ill. 271.

Where a witness testifies in his direct examination to certain values it is proper on cross-examination to ask him upon what basis he estimates such value. *Atchison, &c. Co. v. Blackshire*, 10 Kans. 477. Compare *Markel v. Mondy*, 13 Neb. 322.

In a suit on a debt the defense being that the statutes of limitation had barred the right of action, this question to the defendant on cross-examination was held incompetent. "Do you take advantage of the statute of limitation to avoid paying the plaintiff his demand?"

it is in relation to a fact in issue in the record.<sup>18\*</sup> But upon this subject the authorities are not harmonious, and such questions, when within the proper scope of a cross-examination, are not necessarily

*Marshall v. Morissey*, 6 Ill. App. 542.

A witness may, on cross-examination, be required to affirm or deny a statement made in his direct examination and to state circumstances which tend to disprove such statement. *Stanton County v. Canfield*, 10 Neb. 387.

If a witness states what he "found out" he can be required to give his source of information. *Rosenthal v. Middlebrook*, 63 Tex. 333.

A surveyor having testified that a certain hitching post, against which plaintiff ran and was injured in the night time, was not dangerous, was properly asked on cross-examination if he had not afterward removed such post. *Yeaw v. Williams*, 15 R. I. 20.

On a murder trial where the defendant had testified as to his feelings in order to show that he had no malice it was proper to ask him, on cross-examination, if he had said that he had the same right to kill a man trying to steal his land as one trying to steal his horse. *State v. West*, 95 Mo. 139.

Where a witness claims to have had his nervous system ruined in a railroad wreck, it is proper on cross-examination to inquire into his skill as a billiard player. *Gamble v. Central R. Co.* 74 Ga. 586.

Questions propounded on the cross-examination merely for the purpose of ascertaining the names of witnesses whom the cross-examiner desires to call, are properly

excluded. *Storm v. United States*, 94 U. S. 76.

On the cross-examination of a witness, the counsel may ask him if he (the witness) ever had made a wager that one of the parties would recover in the suit. *Kellogg v. Nelson*, 5 Wis. 125.

Questions which do not tend to rebut, impeach, modify or explain testimony given in chief have been held incompetent on the cross-examination. *Atchison, &c. R. Co. v. Grants*, 38 Kans. 608, 5 Am. St. 780.

<sup>18\*</sup> *United States v. White*, 5 Cranch (C. C.) 73; *United States v. Hudland*, 5 Cranch (C. C.) 309; *State v. Kane*, 36 La. Ann. 153; *Kirschner v. State*, 9 Wis. 140.

The question, "Do your neighbors call you lying Josh?" was disallowed. *Hersom v. Henderson*, 23 N. H. 498. So was the question, "Don't you love the defendant?" *Blunt v. State*, 9 Tex. App. 234.

It was held to be within the discretion of the trial court to allow a witness on a murder trial to be asked this question, "Did you not kill a man in Chicago and flee from there?" *State v. Chee Gong*, 17 Ore. 635.

The use of such questions is within the discretion of the trial court. *Chapman v. Loomis*, 36 Conn. 459.

When important, no objection will be interposed to a witness answering on the cross-examination as to whether or not he had any private conversation with the counsel of the party calling him. *Forney v. Ferrell*, 4 W. Va. 729.

inadmissible merely because the answer may tend to degrade or disgrace the witness.<sup>19</sup>

§ 901. **What may be inquired into—May test knowledge.**—On cross-examination it is competent for counsel to test the knowledge of the witness, or rather the value of the belief of the witness. As where the genuineness of a signature was in question, it was held competent for counsel, on cross-examination, to put into the hand of the witness a paper, not at all connected with the cause, and ask the witness if that was written by the same party.<sup>20</sup>

§ 902. **When preliminary examination by court, no cross-examination as matter of right.**—In a preliminary examination by the court as to circumstances under which confessions were obtained it was held that counsel had no right to cross-examine as a matter of right.<sup>21</sup> The purpose of such an examination is to satisfy the judge whether the evidence is admissible, and upon the request being made, it was for him to direct the course of the examination; and he might, if he thought proper, direct the prosecuting officer to conduct it. Of course the right of cross-examination should not be thus abridged when the evidence is offered to the jury.

§ 903. **No cross-examination because of impossibility.**—If for some reason, after the direct examination or examination-in-chief, it becomes impossible to proceed with a cross-examination, then the direct examination must be stricken from the evidence. As where one after being sworn and examined-in-chief fainted away, and after rallying therefrom became so seriously ill as to render her cross-examination impossible, it was held that the evidence already given should be excluded.<sup>22</sup> So, also, where a witness dies after his examination-in-chief, but before he is cross-examined.<sup>23</sup>

<sup>19</sup> See *People v. Sharp*, 107 N. Y. 427, 1 Am. St. 851; *Spencer v. Robins*, 106 Ind. 580; *State v. Chee Gong*, 17 Ore. 635, 21 Pac. 882; *Chapman v. Loomis*, 36 Conn. 459; *United States v. Wood*, 4 Dak. 455, 33 N. W. 59; *People v. Manning*, 48 Cal. 335. See, also, articles in 59 Cent. Law Jour. 143, 164, 184, and post §§ 1005, 1007.

<sup>20</sup> *Younge v. Honner*, 1 C. & K. 51. See, also, *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

<sup>21</sup> *Commonwealth v. Morrell*, 99 Mass. 542. Contra, *State v. Miller*, 42 La. Ann. 1186. Compare *Becker v. Quigg*, 54 Ill. 390; *Coulson v. Disborough*, 2 Q. B. (1894) 316.

<sup>22</sup> *People v. Cole*, 43 N. Y. 508. Accord: *Tate v. State*, 86 Ala. 33; *Lothrop v. Roberts*, 16 Colo. 250; *Thill v. Perkins Electric Lamp Co.* 63 Conn. 478; *Heath v. Waters* 40 Mich. 457, 471; *Grimes v. Cannell*, 23 Neb. 187; *Martin v. Elden*, 32 Ohio St. 282.

<sup>23</sup> *Kissam v. Forrest*, 25 Wend.

§ 904. **Leading questions.**—As already stated, leading questions are allowed on the cross-examination, subject to the exception that where a witness shows a bias in favor of the cross-examiner, the power is in the court's discretion to forbid leading questions.<sup>24</sup> Some courts make a distinction and hold that on cross-examination counsel, while seeking to bring out new matter constituting an element of the intended defense, does not have the right to put leading questions. Where new matter is gone into on the cross-examination, leading questions will not ordinarily be permitted.<sup>25</sup> But it has been held that it is discretionary with the court in such a case.<sup>26</sup>

§ 905. **Discretion of court—In general—Latitude.**—It has been stated, as a general rule, that the extent of a cross-examination is usually a matter of discretion with the trial judge, to which no exception

(N. Y.) 651; *Sperry v. Moore*, 42 Mich. 353. The court may, in view of all the circumstances of the case and to prevent a failure of justice, exercise its discretion as to whether or not such testimony shall be stricken out. *Gass v. Stinson*, 3 Sumn. (U. S.) 98, 104.

<sup>24</sup> *Hardy's Case*, 24 How. St. Tr. 755; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; ante § 851.

If a witness on the examination in chief appears to be hostile to the party calling him, in the cross-examination the court should restrict the cross-examiner in his use of leading questions far enough, at least, to make the examination consistent with justice and equity. *Wallace v. Taunton Railway*, 119 Mass. 91; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 498.

<sup>25</sup> *Levi v. State*, 14 Neb. 1. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own. *People v. Oyer & Terminer*, 83 N. Y.

436. In the course of the opinion the court, in speaking of this rule, used this language: "A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense."

<sup>26</sup> *Legg v. Drake*, 1 Ohio St. 286; *Moody v. Rowell*, 17 Pick. (Mass.) 490.

may, ordinarily, be successfully taken.<sup>27</sup> It requires a great abuse of discretion to justify a reversal for permitting too much latitude on the part of the one cross-examining.<sup>28</sup> It has been held that the trial judge may postpone the cross-examination to a later stage in the case,<sup>29</sup> or permit a cross-examination by a party after he has closed his case.<sup>30</sup> The latitude of the cross-examination is, to a large extent, within the discretion of the judge presiding at the trial,<sup>31</sup> and will not be disturbed on appeal unless there has been flagrant abuse.<sup>32</sup>

§ 906. **Discretion of court—May limit needless prolongation and protect witness.**—It is within the discretion of the presiding judge to put an end to unnecessary repetition of interrogations by the cross-examiner,<sup>33</sup> and where the cross-examination is needlessly prolonged he may bring it to a close.<sup>34</sup> It is not only within the discretionary power of the court to see that witnesses are given respectful hearing

<sup>27</sup> Rushmore v. Hall, 12 Abb. (N. Y.) Pr. 420.

<sup>28</sup> Ingram v. State, 67 Ala. 67.

<sup>29</sup> Campau v. Dewey, 9 Mich. 381.

<sup>30</sup> Young v. Bennett, 5 Ill. 43.

<sup>31</sup> Knight v. Cunningham, 13 N. Y. S. 100; Brumagim v. Bradshaw, 39 Cal. 24; Stewart v. People, 23 Mich. 63; Commonwealth v. Lyden, 113 Mass. 452; Wallace v. Taunton, &c. R. Co. 119 Mass. 91; Thornton v. Hook, 36 Cal. 223; Arnold v. Nye, 23 Mich. 286; La Beau v. People, 34 N. Y. 223; Hamilton v. Miller, 46 Kans. 486, 26 Pac. 1030; In re Mason, 14 N. Y. S. 434; Wallace v. Wallace, 62 Iowa, 651; Gardner v. Kellogg, 23 Minn. 463; Hay v. Douglas, 8 Abb. Pr. (N. Y.) 217; Wroe v. State, 20 Ohio St. 460; Holdridge v. Lee, 3 S. Dak. 134, 52 N. W. 265.

The court may postpone the cross-examination. Campau v. Dewey, 9 Mich. 381, and also may allow a party to cross-examine even after he has rested his case. Young v. Bennett, 5 Ill. 43.

There is no legal right to require a witness to repeat a former part of

his testimony. Aiken v. Stewart, 63 Pa. St. 30.

The court may refuse to allow a cross-examination to be unreasonably extended. Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364.

<sup>32</sup> Ingram v. State, 67 Ala. 67; Steene v. Aylesworth, 18 Conn. 244; State v. Brown, 4 La. Ann. 505; State v. Parker, 4 La. Ann. 84; Prescott v. Ward, 10 Allen (Mass.), 38; West v. State, 22 N. J. L. 212; Plato v. Kelly, 16 Abb. Pr. (N. Y.) 188; State v. Benjamin, 7 La. Ann. 48; Rand v. Newton, 6 Allen (Mass.) 38; Boles v. State, 24 Miss. 445; Fry v. Bennett, 3 Bosw. (N. Y.) 200; Clark v. Trinity Church, 5 W. & S. (Pa.) 266.

<sup>33</sup> Demeritt v. Randall, 116 Mass. 331; Beers v. Payment, 95 Mich. 261; Jones v. Stevens, 36 Neb. 849; Mason v. Hinds, 19 N. Y. S. 996; Baldwin v. St. Louis, &c. R. Co. 75 Iowa, 297; Young v. Harris, 4 Dak. 367.

<sup>34</sup> Allen v. Kirk, 81 Iowa, 658; Hamilton v. Hulett, 51 Minn. 208; Jones v. Stevens, 36 Neb. 849; Woolfolk v. State, 85 Ga. 69; Toledo, &c. R. Co. v. Bailey, 43 Ill. App. 292.



and to protect them from unnecessary attacks of counsel, but it is the duty of the court to do so.<sup>35</sup>

**§ 907. Discretion of court—One attorney cross-examine.**—Where there are several attorneys on the same side engaged in a trial, it is within the discretion of the court to require the attorney who begins putting questions on the cross-examination to continue so to do until the examination is completed.<sup>36</sup> There are exceptions to this rule, however, as where the attorney is for some reason unable to complete it, and where several parties have different attorneys and the interests of such parties are antagonistic. It follows from the foregoing that both plaintiff and defendant may cross-examine an intervenor.<sup>37</sup> The cross-examination does not have to be conducted by any particular one of the attorneys engaged on the same side of a cause, nor by the attorney who conducts the examination-in-chief of his own witnesses.<sup>38</sup>

**§ 908. Where witness is biased, interested or unwilling.**—Where a witness has given the opposite party good reason to believe that he was biased, partial or corrupt, the court will permit a very wide range to be covered in the cross-examination of such witness.<sup>39</sup> So the interest of an adverse witness may usually be shown on cross-examination.<sup>40</sup> And where the witness is unwilling much latitude is always allowed in the cross-examination.<sup>41</sup>

<sup>35</sup> *Rains v. State*, 88 Ala. 91; *French v. Wilkinson*, 93 Mich. 322; *West Chicago St. R. Co. v. Groshon*, 51 Ill. App. 463.

<sup>36</sup> *Olive v. State*, 11 Neb. 1, 26; *Baumier v. Artian*, 65 Mich. 31.

<sup>37</sup> *Townsend's Succession*, 40 La. Ann. 66.

<sup>38</sup> *Oliver v. State*, 11 Neb. 1. As to how many attorneys may take part in the examination of a witness is within the discretion of the court.

Under a rule of the Michigan Circuit Courts providing that "one counsel on each side shall examine and cross-examine witnesses," a witness who is recalled cannot be cross-examined by an associate counsel. *Cook v. Standard, &c. Co.* 86 Mich. 554.

<sup>39</sup> *In re Carmichael*, 36 Ala. 514;

*Floyd v. Wallace*, 31 Ga. 688; *People v. Long*, 50 Mich. 249; *People v. Wasson*, 65 Cal. 538; *Watson v. Townsby*, 60 N. H. 491; *State v. Collins*, 33 Kans. 77; *Hardy v. Norton*, 66 Barb. (N. Y.) 527.

If a party to an action, after testifying in his own behalf, refuse to answer a proper cross-interrogatory, his whole testimony may be stricken out. *Howard v. Chamberlin*, 64 Ga. 684.

A witness for the prosecution may be cross-examined for the purpose of showing his hostility. *People v. Lee Ah Chuck*, 66 Cal. 662.

<sup>40</sup> *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Kizer v. Walden*, 198 Ill. 274, 65 N. E. 116.

<sup>41</sup> *Pryor v. Harris*, 30 Ala. 118; *Cramer v. Cullinaue*, 2 MacArth.

§ 909. **Where party becomes witness.**—Where a party himself becomes a witness the same rule generally applies as to any other witness. When a defendant takes the witness stand he subjects himself to a searching cross-examination over a very wide range as to the topics or inquiry, and it is a peril the defendant assumes when consenting to become a witness in his own behalf.<sup>42</sup> A defendant in a criminal case taking the witness stand in his own behalf thereby subjects himself to a cross-examination upon the same terms as any other witness.<sup>43</sup> However, it is generally confined to the matters gone into

(D. C.) 197; *Rea v. Missouri*, 17 Wall. (U. S.) 533; *Daniels v. Weeks*, 90 Mich. 190.

"More latitude is always allowed in cross-examination, where the witness is one of the parties in interest, or where the person is an unwilling witness, than in the case of an ordinary witness; and we think it is safe to say that a circuit court may, in its discretion, where a party in interest is a witness, allow the cross-examination to take a wider range; and, where the cross-examination has not been confined strictly to the examination-in-chief, it will not be held error, unless it appears that there has been an abuse of the exercise of a sound legal discretion." *Hanchett v. Kimbark*, 118 Ill. 121.

A hostile witness may be asked, in a criminal suit for selling liquor unlawfully, the question, "Don't you think it was lager beer?" *Commonwealth v. Moineham*, 140 Mass. 463.

<sup>42</sup> *People v. Webster*, 139 N. Y. 73, 83, 84, 34 N. E. 730. Accord: *People v. McCormick*, 135 U. S. 663; *People v. Conroy*, 153 N. Y. 174, 47 N. E. 258.

<sup>43</sup> *People v. Razelle*, 78 Cal. 84; *State v. Saunders*, 14 Ore. 300; *State v. Owen*, 78 Mo. 367; *State v. Witham*, 72 Me. 531; *McKeone v. People*, 6 Colo. 346; *State v. Red*, 53

Iowa, 69; *Thomas v. State*, 103 Ind. 419; *Connors v. People*, 50 N. Y. 240; *Norfolk v. Gaylord*, 28 Conn. 309; *Commonwealth v. Mullen*, 97 Mass. 545; *Stover v. People*, 56 N. Y. 315; *Brandon v. People*, 42 N. Y. 265; *State v. Ober*, 52 N. H. 459; *Woburn v. Henshaw*, 101 Mass. 193; *McGarry v. People*, 2 Lans. (N. Y.) 227; *Fletcher v. State*, 49 Ind. 124; *State v. Wentworth*, 65 Me. 234; *People v. Fong Ching*, 78 Cal. 169; *Rains v. State*, 88 Ala. 91; *State v. Beaty*, 25 Mo. App. 214; *Este v. Wilshire*, 44 Ohio St. 636; *State v. Pfefferle*, 36 Kans. 90.

In *Commonwealth v. Nichols*, 114 Mass. 285, the court said: "But if he" (defendant) "puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses."

It has been held that he may be asked on the cross-examination how many times he has been in prison. *People v. Hovey*, 29 Hun (N. Y.) 382.

on the direct examination.<sup>44</sup> It is within the discretion of the trial court to allow the defendant in a criminal case to be called for further cross-examination.<sup>45</sup>

**§ 910. Cross-examination of accomplices.**—In the cross-examination of a witness who is an accomplice, great latitude is allowed as to questions tending to injure his credit or to prove his accuracy or veracity.<sup>46</sup> This is particularly true of one who turns state's evidence against his alleged associates in crime.<sup>47</sup>

In Missouri he can be cross-examined only as to the matters testified to by him in chief. *State v. Porter*, 75 Mo. 171; *State v. McLaughlin*, 76 Mo. 320; *State v. Turner*, 76 Mo. 350; *State v. Chamberlain*, 89 Mo. 129.

In a civil prosecution for damages resulting from an indecent assault, the defendant may properly be cross-examined as to whether he was ever before arrested on a criminal charge by a woman, and whether he had settled with her by payment of money. *Leland v. Kauth*, 47 Mich. 508.

The complaining witness in a bastardy suit may be questioned as to whether or not she had stated that she intended getting a prostitute to swear a case against the defendant. *People v. White*, 53 Mich. 537.

The prisoner on a trial for murder, having testified in his own behalf may not be asked on cross-examination if he did not "belong to the Jesse James gang." *Clarke v. State*, 78 Ala. 474.

A person being on trial for murder and having testified as a witness in his own behalf, was asked on cross-examination, whether he had not assaulted certain other persons with a deadly weapon. Held, on appeal, that an objection to such a question was properly sustained. *People v. Bishop*, 81 Cal. 113.

An accused taking the stand in his own behalf may be cross-examined by the counsel of his co-defendants, with whom he is jointly indicted, in addition to the cross-examination of the prosecuting attorney. *Commonwealth v. Mullen*, 150 Mass. 394.

A defendant in a criminal case who becomes a witness in his own behalf cannot be asked whether he had been arrested for shooting at people or whether he was connected with an unlawful business. *People v. Hamblin*, 68 Cal. 101.

<sup>44</sup> *State v. McLaughlin*, 76 Mo. 320; *State v. Turner*, 76 Mo. 350; *State v. Porter*, 75 Mo. 171; *State v. Underwood*, 44 La. Ann. 852; *State v. Turner*, 110 Mo. 196, 19 S. W. 645.

Where a witness assumes to state on his examination-in-chief all the events that had transpired between two certain dates, the cross-examining party may name an event and ask him if it did not occur between those dates. *People v. Wallin*, 55 Mich. 497, 22 N. W. 15; *People v. Russell*, 46 Cal. 121; *Greenly v. State*, 60 Ind. 141.

<sup>45</sup> *State v. Cohn*, 9 Nev. 179; *State v. Horne*, 9 Kans. 119.

<sup>46</sup> *Marler v. State*, 68 Ala. 580; *Lee v. State*, 21 Ohio St. 151.

<sup>47</sup> *Tullis v. State*, 4 Ohio Law Jour. 12; *State v. Condry*, 5 Jones L. (N. Car.) 418.

§ 911. **Not necessary to state what to be proved.**—A cross-examiner is not, ordinarily, required to state what he expects to prove on the cross-examination.<sup>48</sup> He is not, like the party who produces a witness, supposed to know what the witness will testify to, and he could not well state what he expected to show by the cross-examination. The reason and the spirit of the rule requiring such an offer on examination-in-chief have no application to such a case, and such a requirement would often defeat the very purpose of the cross-examination.

§ 912. **When make adverse witness one's own.**—Where a party wishes to make a witness on the opposite side his own witness as to new matter not gone into in any way by the opposite party, he must do so by introducing him in a subsequent part of the cause.<sup>49</sup> This is the result of rules and principles already considered.

<sup>48</sup> *Harness v. State*, 57 Ind. 1; *Martin v. Elden*, 32 Ohio St. 282; *Wood v. State*, 92 Ind. 269; *Hyland v. Milner*, 99 Ind. 308; *Bidgood v. State*, 115 Ind. 275, 17 N. E. 621.

<sup>49</sup> *Brown v. State*, 28 Ga. 199; *Dearmond v. Dearmond*, 12 Ind. 455; *Philadelphia Railroad v. Stimpson*, 14 Pet. (U. S.) 448; *Patton v. Hamilton*, 12 Ind. 256; *Adams v. State*, 28 Fla. 511.

If the cross-examiner desires to call out matters not drawn out on the direct examination, he must make the witness his own and call him as such. *Boggs v. Thompson*, 13 Neb. 403.

In Alabama, when the plaintiff seeks to establish the correctness of his demand by his own oath, he must swear to the fact of non-payment, and cannot be cross-examined as to matters outside of the facts to which he testifies; but if the court allows him to testify, without swearing to the fact of non-payment, he cannot complain on error that the defendant was permitted to cross-examine him generally. *Pryor v. Harris*, 30 Ala.

118. The introduction of one of several co-defendants, as a witness by the plaintiff, does not constitute him a general witness in the cause, and it is not permissible for the defendants to examine him on any matter of defence not called out by the plaintiff in his examination. *Bell v. Chambers*, 38 Ala. 660.

If a party desires anything from his opponent's witnesses which is not proper on cross-examination, he must make them his own witnesses as to such matter. *Stevens v. Brown*, 12 Ill. App. 619. See *Schmidt v. Schmidt*, 47 Minn. 451.

Where a party to a suit is called by the opposite party as a witness, his own counsel may cross-examine him. *Teel v. Byrne*, 24 N. J. L. 631.

If a party supports some portion of his own cause by his own affidavit or testimony and then refuses to be subjected to a cross-examination, the court will, on motion, strike out such affidavit or testimony. *Howard v. Chamberlin*, 64 Ga. 684; *Meyer v. Lent*, 16 Barb (N. Y.) 538.

A party is not bound to detain his

### § 913. Whether adverse party vouches for credibility of witness.

A party on cross-examination may interrogate the witness as to any matter relevant to the issue without vouching for his credibility, or forfeiting the right to assail or impeach him as the witness of his adversary.<sup>50</sup> But this rule does not prevail, to the full extent at least, where the party makes the witness of an adverse party his own. And if a witness answers an irrelevant question before the same is disallowed or withdrawn, the answer to this collateral matter cannot afterwards be contradicted by other testimony.<sup>51</sup>

§ 914. Whether witness to a particular fact becomes witness for all purposes.—The question to be considered here is whether a witness who is called to testify to a particular fact may be fully cross-examined, not only upon that particular fact, but also upon all facts material to the issue. That is, whether the cross-examination should be confined to the facts testified to in the examination-in-chief. This question has already been considered to some extent, but there is much conflict upon the subject, and a fuller treatment seems desirable.

§ 915. English rule—In general.—In England the rule prevails that if a witness is called to testify to a particular fact he may be fully cross-examined upon all facts material to the issue. In other words, such a witness becomes a witness for all purposes and the cross-examination is not confined to the facts concerning which questions were asked on the examination-in-chief.<sup>52</sup>

§ 916. English rule—Jurisdictions in accord.—Some of the jurisdictions within the United States are in accord with the English rule.<sup>53</sup>

witness to suit the convenience of his adversary if the adversary fails to claim the right to cross-examine at the proper time. *Sheffield v. Rochester, &c. R. Co.* 21 Barb. (N. Y.) 339.

<sup>50</sup> *Clary v. Hardeeville Co.* 100 Fed. 915. Compare *Jones v. State*, 115 Ala. 67, 22 So. 566; *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 52 N. E. 1095.

<sup>51</sup> *McIntire v. Young*, 6 Blackf. (Ind.) 496; *United States v. Dickinson*, 2 McLean (U. S.) 325; *Carpenter v. Ward*, 30 N. Y. 243.

<sup>52</sup> *Mayor v. Murray*, 19 L. J. (Ch.) 281.

<sup>53</sup> *Blackington v. Johnson*, 126 Mass. 21; *Jones v. Roberts*, 37 Mo. App. 163; *Lamprey v. Munch*, 21 Minn. 379; *Hay v. Reid*, 85 Mich. 296; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Dillard v. Samuels*, 25 S. Car. 318, 322; *Rush v. French*, 1 Ariz. 99; *Linsley v. Lovely*, 26 Vt. 123; *Huntsville Belt Line, &c. R. Co. v. Corpening*, 97 Ala. 681; *News Pub. Co. v. Butler*, 95 Ga. 559; *Sands v. Southern R. Co.* 108 Tenn. 1, 64 S. W. 478.

Some authorities hold that the cross-examination may extend to all subjects pertinent to the case, whether specifically gone into on the direct examination or not.<sup>54</sup>

§ 917. **American rule—General statement of.**—The general American rule<sup>55</sup> is that on the cross-examination questions can be asked only concerning facts and circumstances testified about or con-

<sup>54</sup> *State v. Baker*, 43 La. Ann. 1168; *Kibler v. McIlwain*, 16 S. Car. 550; *State v. Sayers*, 58 Mo. 585; *Livingston v. Keech*, 34 N. Y. S. 547; *Fralick v. Presley*, 29 Ala. 457; *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483; *White v. Dinkius*, 19 Ga. 285; *Murray v. Brooklyn City Co.* 7 N. Y. S. 900; *Mask v. State*, 32 Miss. 405; *Barker v. Blount*, 63 Ga. 423; *Schneider v. Rapp*, 33 Ind. 270; *Yarborough v. Davis* (Tex. App.), 15 S. W. 713; *Missouri, &c. R. Co. v. Haines*, 10 Kans. 439; *Ingram v. State*, 67 Ala. 67; *Rush v. French*, 1 Ariz. 99; *Bulen v. Granger*, 58 Mich. 274; *Jones v. Roberts*, 37 Mo. App. 163; *Graham v. Larimer*, 83 Cal. 173; *McNeal v. Pittsburgh, &c. R. Co.* 131 Pa. St. 184; *Davis v. Powder Works*, 84 Cal. 617.

It is not competent upon cross-examination to question a witness upon matters irrelevant to the issue with the view and sole purpose to discredit him. *Bivens v. Brown*, 37 Ala. 422; *Seavy v. Dearborn*, 19 N. H. 351.

In Louisiana, matters not brought out in the direct examination may be inquired into on the cross-examination for the purpose of impeaching the credibility of the witness. *State v. Thomas*, 32 La. Ann. 349; *State v. Willingham*, 33 La. Ann. 537; *State v. Gregory*, 33 La. Ann. 737; *King v. Atkins*, 33 La. Ann. 1057.

In a criminal case the defendant's counsel is not restricted in his

cross-examination of a witness against the accused to matters brought out on the direct examination. *State v. Thomas*, 32 La. Ann. 349; *State v. Brady*, 87 Mo. 142.

Where a father being sued on a promissory note calls his son as a witness and the son testified that certain words in the note were written by him, and not by his father, it was held proper on cross-examination to require the son to write those words for comparison with the same words written in the note. *Huff v. Nims*, 11 Neb. 363.

A witness having stated on his examination-in-chief part of what he said at a certain time and place, it is proper to have him state on his cross-examination all that he said at such time and place. *Watrous v. Cunningham*, 71 Cal. 30; *Territory v. Rehberg*, 6 Mont. 467.

<sup>55</sup> *Chandler v. Beal*, 132 Ind. 596, 32 N. E. 597; *Lake Erie, &c. R. Co. v. Miller*, 24 Ind. App. 662, 57 N. E. 596; *Aurora v. Cobb*, 21 Ind. 492; *Cokely v. State*, 4 Iowa, 477; *Stafford v. Fargo*, 35 Ill. 481, 486; *Hurlbut v. Meeker*, 104 Ill. 542; *Aitken v. Mendenhall*, 25 Cal. 212; *People v. Miller*, 33 Cal. 99; *Campau v. Dewey*, 9 Mich. 381; *Castor v. Bavington*, 2 W. & S. (Pa.) 505; *Floyd v. Bovard*, 6 W. & S. (Pa.) 75; *Landsberger v. Gorham*, 5 Cal. 450; *People v. Horton*, 4 Mich. 67; *Congar v. Galena, &c. R. Co.* 17 Wis. 477; *Chicago, &c. R. Co. v. Nor-*

nected with matters brought out in the examination-in-chief. In

thern, &c. Co. 36 Ill. 60; Beaulieu v. Parsons, 2 Minn. 37; Rucker v. Eddings, 7 Mo. 115; Helser v. McGrath, 52 Pa. St. 531; Bell v. Chambers, 38 Ala. 660; Bell v. Prewitt, 62 Ill. 362; Lloyd v. Thompson, 5 Ill. App. 90; Cokely v. State, 4 Iowa, 477; Leavitt v. Stausell, 44 Mich. 424; Wilhelmi v. Leonard, 13 Iowa, 330; Greateon v. Smith, 1 Daly (N. Y.) 380; Donnelly v. State, 2 Dutch. (N. J.) 463, 601; Johnson v. Jones, 1 Black (U. S.) 209, 216; Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974; Chicago, &c. R. Co. v. Stewart, 47 Kans. 704, 28 Pac. 1017; Gale v. People, 26 Mich. 157; Washington v. State, 17 Tex. App. 197; Clark v. Reiniger, 66 Iowa, 507; Barre v. Council Bluffs Ins. Co. 76 Iowa, 603; Anheuser-Busch, &c. Co. v. Hutmacher, 127 Ill. 652; Sharp v. Hoffman, 79 Cal. 404; Woodruff v. White, 25 Neb. 745; McCormick Co. v. Jacobson, 77 Iowa, 582; Atchison v. Rose, 43 Kans. 605; Anderson v. Black, 70 Cal. 226; State v. Johnson, 41 La. Ann. 1076; State v. Curran, 51 Iowa, 112; Allen v. Fortier, 37 Minn. 218; Roberts v. Boston, 149 Mass. 346; Alexander v. Kaiser, 149 Mass. 321; Simons v. Busby, 119 Ind. 13; Buckley v. Buckley, 12 Nev. 423; Ferguson v. Rutherford, 7 Nev. 385; Turner v. Reynolds, 23 Pa. St. 199; McKone v. Williams, 37 Ill. App. 591; Tischler v. Apple, 30 Fla. 132, 11 So. 273; Martin v. Capital Ins. Co. 85 Iowa, 643, 52 N. W. 534; Mt. Vernon v. Brooks, 39 Ill. App. 426; Mitchell v. Welch, 17 Pa. St. 339; Sauntry v. United States, 117 Fed. 132; People v. Derby, 108 Cal. 54; Russell v. Cruttenden, 53 Conn. 564; Wendt v. Chicago, &c. R. Co. 4 S. Dak. 476; Williams v. State, 32 Fla.

315; Siberry v. State, 133 Ind. 677; McCormick v. Gliem, 13 Mont. 469; Mordhorst v. Nebraska Telephone Co. 28 Neb. 610; Willis v. Lance, 28 Ore. 371; State v. Ellwood, 17 R. 1. 763; Wendt v. Chicago, &c. R. Co. 4 S. Dak. 476; Cheek v. Herndon, 82 Tex. 146; People v. Thiede, 11 Utah, 241; Stiles v. Estabrook, 66 Vt. 535; Patchen v. Parke, &c. Co. 6 Wash. 486; Welcome v. Mitchell, 81 Wis. 566.

Where a witness on the direct examination refreshed his memory from an account book, the opposite party, on cross-examination, was entitled to inspect its contents. McKivitt v. Cone, 30 Iowa, 455.

It is proper to cross-examine a witness as to matters testified to by him in a deposition taken in the suit, even though such deposition has not been offered in evidence. Marx v. Strauss, 93 Ala. 453, 9 So. 818.

In a murder case the question, "What is the character of your associates in your business as a detective?" propounded to a detective, was held irrelevant. Yoe v. People, 49 Ill. 410.

The party against whom a witness has been introduced and examined-in-chief has a right to cross-examine him fully as to his knowledge touching any and all facts material to the case. Fralick v. Presley, 29 Ala. 457; White v. Dinkins, 19 Ga. 285; Mask v. State, 32 Miss. 405; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483.

In a suit for damages growing out of personal injuries resulting to a person because of the upsetting of a stage coach, the plaintiff having testified that he had leave to ride

a Texas case<sup>56</sup> the court thus states the rule: "The cross-examination of an ordinary witness can only be conducted as to such matters as are pertinent to the matters brought out in the examination-in-chief; and in most jurisdictions in our country, where a party seeks, on cross-examination, to bring out matters not germane or pertinent to the examination-in-chief, if they are legitimate in evidence as competent testimony for the party seeking to bring them out on cross-examination, he will not be permitted to do so in the cross-examination of such witness, but when he comes to present his case he can introduce the witness on his own behalf. This practice renders patent the fact that the witness, so far as the matters which do not pertain to the examination-in-chief are concerned, is the witness of the party introducing him. Now, in some jurisdictions, the party is not required to stand the witness aside until he introduces his evidence, but may prove any pertinent fact by the witness introduced by the other party; but in doing so, if he departs from the matter elicited in the examination-in-chief, he makes the witness his own witness." The reason is that it is not proper cross-examination, and further, it reverses the order of proof.<sup>57</sup> All testimony elicited on cross-examination, consisting, as it does, of facts which, though relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain, or modify such facts, or to rebut or modify some influence which might otherwise be drawn from them, must, in the nature of things, constitute a part of the evidence given in chief; and both alike and together must, therefore, it is said, be treated as evidence given on the part of the party calling the witness. The evidence given by the witness is not that alone given in chief, but it is that given in chief, as contradicted, explained, enlarged, narrowed, or modified by the cross-examination. It is simply the combined result of both.<sup>58</sup>

§ 918. **American rule—The best rule.**—By the other or English rule the one cross-examining might prove, through leading questions,

free, it was held proper on cross-examination to ask him whether or not fare had been demanded of him. *Gilmer v. Higley*, 110 U. S. 47.

A witness having testified that he had built a certain house was properly asked on cross-examination if he did not know that another person built that house.

*Phoenix Ins. Co. v. Copeland*, 86 Ala. 551.

<sup>56</sup> *Jones v. State*, 38 Tex. Cr. App. 87, 100.

<sup>57</sup> *Britton v. State*, 115 Ind. 55, 17 N. E. 254.

<sup>58</sup> *Wilson v. Wagar*, 26 Mich. 452. 457. See *Rush v. French*, 1 Ariz. 99; *Bishop v. Averill*, 17 Wash. 209.



new facts by a witness friendly to him whom the opposite party is obliged to call.<sup>59</sup> "A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter, the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense."<sup>60</sup> No injustice is done to the party seeking to avail himself of the evidence, to require that, before its admission, its truth shall be subjected to such tests as the experience of ages has shown were necessary to render reliance thereon at all safe; and where this has been prevented without any fault of the adverse party, to exclude the evidence.<sup>61</sup> Under the American rule a party cannot draw out by means of a cross-examination facts not testified to on the examination-in-chief, which facts make up the substantive defense or claim of the party cross-examining.<sup>62</sup> For example, in ejectment, the witnesses of the plaintiff cannot, on cross-examination, be examined as to the defendant's title.<sup>63</sup> It is a wise rule that the testimony produced must be confined to the point in issue and must correspond with the allegations, otherwise there might be such an overwhelming mass of evidence on irrelevant and immaterial points that the jury would be confused as to just what was the point in issue, and investigations would not only become interminable but the expenses might be enormous. However, some authorities object to the rule

<sup>59</sup> *Knapp v. Schneider*, 24 Wis. 70; *Tourtlotte v. Brown*, 1 Colo. App. 408.

<sup>60</sup> *People v. The Court, &c.* 83 N. Y. 436, 459. Accord: *People v. Burgess*, 153 N. Y. 561; *Nichols v. Nichols*, 147 Mo. 387; *Mueller v. Ferry Co.* 61 N. Y. S. 986; *Jones v. State*, 38 Tex. Cr. App. 87, 100.

<sup>61</sup> *People v. Cole*, 43 N. Y. 508; see, also, *People v. Hayes*, 140 N. Y. 484, 494.

<sup>62</sup> *Denniston v. Philadelphia Co.* 161 Pa. St. 41; *Donnelly v. State*, 26 N. J. L. 463, 601; *People v. Oyer & Term. Court*, 83 N. Y. 436; *Norris v. Cargill*, 57 Wis. 251; *Schmidt v. Schmidt*, 47 Minn. 451; *Sterling v. Bock*, 37 Minn. 29; *Hull v. State*, 93 Ind. 128; *Da Lee v. Blackburn*, 11 Kans. 190; *Malone v. Dougherty*, 79 Pa. St. 46.

<sup>63</sup> *Thatcher v. Olmstead*, 110 Ill. 26.

because it is stated to be inferior in the matter of fairness and liberty of procedure, and also because it always causes petty quibbles.

§ 919. **Rule to be followed not a federal question.**—Owing to the difference of practice or rules that obtain in different jurisdictions, it is important to know whether a federal question is involved in following the rule of a particular jurisdiction. This question has been expressly decided in the supreme court of the United States. Thus, it is held that the question as to whether an accused can be cross-examined merely concerning matters as to which he testified in chief or as to any matter in issue is one of local law, and not a federal question.<sup>64</sup>

§ 920. **American rule—As to facts connected with facts of examinations-in-chief.**—The American rule, however, as generally understood and applied, does not necessarily prevent the cross-examination from going into matters and facts connected with the matters stated in the direct examination.<sup>65</sup> In other words, the cross-examination is not necessarily restricted to the specific matter of the examination-in-chief, but may extend to the general subject thereof.<sup>66</sup> There is some apparent conflict upon this proposition, and some courts are inclined to limit the cross-examination to the specific subject or phase of the general subject gone into on the examination-in-chief, but the rule, as we have stated it, is supported by the weight of authority and the better reasons.

§ 921. **American rule—As to immaterial testimony.**—If immaterial or irrelevant testimony has been received, and not afterward stricken out, it has been held that the right to cross-examine as

<sup>64</sup> *Spies v. People*, 123 U. S. 131, 8 Sup. Ct. 22.

<sup>65</sup> *Dole v. Wooldredge*, 142 Mass. 161, 184; *Chandler v. Allison*, 10 Mich. 460.

<sup>66</sup> *Boyle v. State*, 105 Ind. 469, 5 N. E. 203; *Gemmell v. State*, 16 Ind. App. 154, 158, 43 N. E. 909; *Louisville, &c. R. Co. v. Wood*, 113 Ind. 544, 557, 14 N. E. 572, 16 N. E. 197; *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788; *Marion v. State*, 20 Neb. 233, 29 N. W. 911; *Barker v. Blount*, 63 Ga. 423; *Lamprey v. Munch*, 21

*Minn.* 379; *Buckley v. Buckley*, 12 Nev. 423; *Kibler v. McIlwain*, 16 S. Car. 550; *Meadock v. Kennedy*, 80 Kis. 449, 50 N. W. 393; *Washburn v. Chicago, &c. R. Co.* 184 Wis. 251, 54 N. W. 504; *Yost v. Minneapolis, &c. Works*, 41 Ill. App. 556; *Herrick v. Swomley*, 56 Md. 439; *Richmond, &c. R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209; *Gilmer v. Higley*, 110 U. S. 47; *Eames v. Kaiser*, 142 U. S. 488, 12 Sup. Ct. 302; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332.

to those matters may be claimed as a matter of right.<sup>67</sup> Some courts, however, do not go to this extent, but hold that the right to cross-examine does not exist as a matter of right.<sup>68</sup> And, if evidence given in the examination-in-chief has been afterwards stricken out, there can be no cross-examination upon the matters so eliminated.<sup>69</sup>

**§ 922. American rule—Where testimony by others on same subject matter.**—It is almost unnecessary to state that where the general American rule prevails it holds good, even though other witnesses have testified to the matters about which interrogatories have been proposed, but which were not opened up on the direct examination of the witness now being examined. The rule holds that he must testify as to them himself.<sup>70</sup>

**§ 923. American rule—Where one must make witness his own.** If the adverse party wishes to examine the witness as to matters not brought out in the examination in chief, he must do so by making the witness his own.<sup>71</sup> This is clearly the law where the American rule prevails.

**§ 924. American rule—May rebut or modify inferences or conclusions.**—Counsel, on cross-examination, not only have the right to call out any fact which may contradict or qualify any particular facts stated on the examination-in-chief, but, as a general rule, anything which may tend to rebut or modify any conclusion or inference resulting from the facts so stated.<sup>72</sup> There may also usually be cross-examination concerning the omitted portion of a material

<sup>67</sup> Valin v. McKenaghan, 104 Mich. 213, 62 N. W. 340. See, also, Apple v. Marion County, 127 Ind. 553. Compare Phelps v. Hunt, 43 Conn. 194, 200; People v. French, 95 Cal. 371.

<sup>68</sup> People v. French, 95 Cal. 371, 30 Pac. 567; Phelps v. Hunt, 43 Conn. 194, 200.

<sup>69</sup> Jones v. State, 35 Fla. 289.

<sup>70</sup> State v. Taylor, 45 La. Ann. 1303, 14 So. 26.

<sup>71</sup> Philadelphia R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 461; Northern Pacific R. Co. v. Umlin, 158 U. S. 271, 15 Sup. Ct. 840; Leedom v.

Leedom, 160 Pa. St. 273, 28 Atl. 1024; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989; Atchison v. Rose, 43 Kans. 605; People v. Thiede, 11 Utah, 241; Donnelly v. State, 26 N. J. L. 463.

<sup>72</sup> Wilson v. Wagar, 26 Mich. 452, 457. Accord: Blake v. Powell, 26 Kans. 320, 326; People v. Bidleman, 104 Cal. 608; Haynes v. Ledyard, 33 Mich. 319; Ilson v. Swensen, 53 Minn. 516; Thomas v. Miller, 151 Pa. St. 482; Mayer v. People, 80 N. Y. 364; Gilmer v. Higley, 110 U. S. 47; Central R. Co. v. Allmon, 147 Ill. 471.

transaction or conversation.<sup>73</sup> So there may be, on cross-examination, questions concerning facts which, if true, are inconsistent with the testimony-in-chief or render it unlikely.<sup>74</sup>

§ 925. **American rule—What not excluded.**—The American rule does not exclude questions tending to discredit or impeach the witness, or those designed to show his interest, prejudice or motives, or to test his accuracy, intelligence, and means of knowledge. These matters, as already shown, may be gone into under either rule.<sup>75</sup>

§ 926. **American rule—Rule does not exclude facts that are part of *res gestae*.**—The cross-examination may also, sometimes open up whatever forms part of the *res gestae*, even though it consists of new or defensive facts.<sup>76</sup> For example, where a witness testifies to the signature of a note, the cross-examination may cover the time and place and all the circumstances of such signature, and he may be cross-examined as to when he first saw the note and who showed it to him.<sup>77</sup>

§ 927. **American rule—In discretion of court as to whether brought out on examination-in-chief.**—It is generally left to the sound discretion of the judge presiding at the trial to determine whether or not a question on the cross-examination relates to a fact brought out on the examination-in-chief.<sup>78</sup> The appellate courts are slow to interfere with the exercise of this discretion, but it is not an arbitrary discretion to be exercised without any regard to settled rules or the rights of litigants.

<sup>73</sup> Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985; Vogel v. Harris, 112 Ind. 494, 14 N. E. 385; Murray v. Great Western Ins. Co. 72 Hun (N. Y.) 282; Ah Doon v. Smith, 25 Ore. 89; Currier v. Robinson, 61 Vt. 196; Meadock v. Kennedy, 80 Wis. 449, 50 N. W. 393; People v. Dixon, 94 Cal. 255, 29 Pac. 504; Perdue v. Louisville, &c. R. Co. 100 Ala. 535, 14 So. 366; Black v. Wabash, &c. R. Co. 111 Ill. 351; Aulls v. Young, 98 Mich. 231, 57 N. W. 119; State v. Adams, 108 Mo. 208; Yarborough v. Davis (Tex. App.) 15 S. W. 713.

<sup>74</sup> State v. Flint, 60 Vt. 304; Matter of Mason, 60 Hun (N. Y.) 46; Little v. Lichkoff, 98 Ala. 321; Olson v. Peterson, 33 Neb. 358; Thom-

as v. Chicago, &c. R. Co. 86 Mich. 496, 49 N. W. 547.

<sup>75</sup> See ante §§ 899, 908.

<sup>76</sup> Eames v. Kaiser, 142 U. S. 488; People v. Gallagher, 100 Cal. 466; Glenn v. Gleason, 61 Iowa, 28; McNeal v. Pittsburg & W. R. Co. 131 Pa. St. 184; Graham v. McReynolds, 90 Tenn. 673; Youmans v. Carney, 62 Wis. 580.

<sup>77</sup> Glenn v. Gleason, 61 Iowa, 28; Herrick v. Swomley, 56 Md. 439.

<sup>78</sup> Payne v. Goldbach, 14 Ind. App. 100; News Pub. Co. v. Butler, 95 Ga. 559; Neil v. Thorn, 88 N. Y. 270; Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 341; Huntsville, &c. v. Corpening, 97 Ala. 681.

## CHAPTER XLII.

### RE-EXAMINATION.

Sec.	Sec.
928. Meaning of Term—The Rule.	935. May re-examine on new matter of cross-examination.
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§ 928. **Meaning of term—The rule.**—A re-examination is an examination of a witness after he has been cross-examined upon matters arising out of such cross-examination. After a witness has been cross-examined he may be re-examined, in order that he may explain or modify his testimony as brought out on the cross-examination. And, in some instances, obscurities may be cleared away, although the evidence is not in the strictest sense merely explanatory of relevant matter brought out on cross-examination.<sup>1</sup>

§ 929. **Object.**—The object of the re-examination is, in general, to rehabilitate and strengthen the witness. This is done by allowing the witness to explain or modify his statements made in the cross-examination, and to give in full the matters, concerning which he was cross-examined, but which, in the course of his cross-examination, he was not given the opportunity to explain or qualify. By the direct

<sup>1</sup> Gilbert v. Sage, 5 Lans. (N. Y.) 293, 55 N. W. 753; People v. Mills, 287; State v. McGahey, 3 N. Dak. 94 Mich. 630, 54 N. W. 488.

examination a party produces all the facts which he thinks are essential to establish his case. The cross-examiner, by his questions, endeavors to weaken the case set up by making the facts doubtful, obscure, uncertain, or inconsistent. So, further examination by a party of his own witness may become necessary to clear up and strengthen the case originally set up.

§ 930. *Illustrations.*—Where a part of a conversation or matter is drawn from a witness upon his cross-examination, he may be interrogated upon re-examination generally as to all of such matter or as to all that was said in the conversation which might in any way modify or explain his statements made to the cross-examiner.<sup>2</sup> However, he should be examined only concerning that part of the conversation which has a bearing upon his cross-examination, and not as to independent or collateral matters or statements not connected with, or relating to, the particular subject or statement brought out on the cross-examination.<sup>3</sup>

It may come out on the cross-examination that the witness had a conversation, but what was stated in the conversation may not be asked. On re-examination the substance of the conversation, or at least its general nature and extent, may usually be put in, or inquired

<sup>2</sup> *Roberts v. Roberts*, 85 N. Car. 9; *Commonwealth v. Armstrong*, 158 Mass. 78, 32 N. E. 1032; *Somerville, &c. R. Co. v. Doughty*, 22 N. J. L. 495; *Jaspers v. Lano*, 17 Minn. 296; *Carr v. Moore*, 41 N. H. 131; *Schlencker v. State*, 9 Neb. 241; *Cliff v. Moses*, 112 N. Y. 426. Compare: *People v. Beach*, 87 N. Y. 508; *Winchell v. Latham*, 6 Cow. (N. Y.) 682; *Walsh v. Porterfield*, 87 Pa. St. 376.

Where a witness, owing to interruption, fails to complete his answer to a question asked him on cross-examination, he may complete it on the re-examination. *Bellows v. Sowles*, 59 Vt. 63, 7 Atl. 542; *Graves v. Santway*, 6 N. Y. S. 892; *Stoner v. Devilbiss*, 70 Md. 144; *State v. Glenn*, 95 N. Car. 677.

Where the defendant, on cross-examination, inquired of a witness

what a third person told him, held that this did not authorize the plaintiff, upon a re-examination, to ask the witness what the third person, in the same conversation, said the defendant himself had told him. *McCracken v. West*, 17 Ohio, 16.

If the conversation is mere hearsay the rule does not apply. *Wagner v. People*, 30 Mich. 384.

Where the fact of the existence of a written instrument is brought out on the cross-examination, it is proper on the re-direct examination to require the production of the paper. *Fillmore v. Union Pacific R. Co.* 2 Wyoming, 94.

<sup>3</sup> *Commonwealth v. Keyes*, 11 Gray (Mass.) 323; *People v. Beach*, 87 N. Y. 508; *McCracken v. West*, 17 Ohio, 16; *Walsh v. Porterfield*, 87 Pa. St. 376; *Hansen v. Miller*, 145 Ill. 538, 32 N.

into, if without so doing the mere fact of a conversation having been had would make it unfavorable to the case of the party seeking to have the substance of the entire conversation shown.<sup>4</sup> By asking questions not really proper on cross-examination the door is thus sometimes opened to the adversary. So, a witness may be requested to bring in certain correspondence, and the cross-examiner may have used but one or two of the letters. It may then become essential that all the letters should be introduced, and this is frequently done on the re-examination.

If the cross-examiner asks questions bringing out facts which tend to impeach the witness, it has been held that the latter may, on re-examination, make explanations showing that such facts are consistent with his credibility as a witness, although such testimony would otherwise be irrelevant.<sup>5</sup> So, it has been held that where a witness is asked upon the cross-examination when he was first questioned concerning the facts to which he testified on the direct examination, he may be asked whether he had previously stated the same matters to other persons,<sup>6</sup> or as to the truth of a written statement of such facts which was signed by the witness.<sup>7</sup> Other illustrative cases are cited in the note.<sup>8</sup>

**§ 931. New matter—Not generally gone into.**—On the re-examination entirely new matter should not be introduced. The rule

E. 548; *Beers v. Payment*, 95 Mich. 261, 54 N. W. 886; *The Queen's Case*, 2 Brod. & B. 284. See, also, *Prince v. Samo*, 7 Ad. & El. 627.

<sup>4</sup>*Somerville, &c. R. Co. v. Dougherty*, 22 N. J. L. 495; *Clift v. Moses*, 112 N. Y. 426; *Simmons v. Havens*, 101 N. Y. 427. See, also, *Harness v. State*, 57 Ind. 1; *Commonwealth v. Armstrong*, 158 Mass. 78, 32 N. E. 1032; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Phares v. Barber*, 61 Ill. 271; *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Mason v. Tallman*, 34 Me. 472; *Addison v. State* 48 Ala. 478; *Roberts v. Roberts*, 85 N. Car. 9; *People v. Dixon*, 94 Cal. 255; *Wolf v. Wolf*, 158 Pa. St. 621; *Ferris v. Hard*, 135 N. Y. 354; *Shackleford*

*v. State*, 43 Tex. 138. But not distinct and independent statements. *People v. Beech*, 87 N. Y. 508, 512. See, also, *Miller v. Illinois Cent. R. Co.* 89 Iowa, 567, 57 N. W. 418; *Walsh v. Porterfield*, 87 Pa. St. 376; *The Queen's Case*, 2 Brod. & B. 284.

<sup>5</sup>*State v. Ezell*, 41 Tex. 35; *United States v. 18 Barrels of High Wines*, 8 Blatchf. (U. S.) 475.

<sup>6</sup>*Commonwealth v. Wilson*, 1 Gray (Mass.) 337.

<sup>7</sup>*People v. Mills*, 94 Mich. 630, 54 N. W. 488.

<sup>8</sup>*State v. McQueen*, 108 La. 410, 32 So. 412; *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164, 64 N. E. 35; *Smith v. Morrill*, 71 N. H. 409, 52 Atl. 928; *International, &c. R. Co. v. Locke* (Tex. Civ. App.) 67 S. W. 1082.

is thus stated in one case: "The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther and introduce a matter new in itself, and not suited to the purpose of explaining either the expressions or the motive of the witness."<sup>9</sup> No questions can, ordinarily, be asked as a matter of right which do not relate to matters gone into on the cross-examination.<sup>10</sup>

**§ 932. New matters sometimes in civil cases.**—In most jurisdictions it is held that in civil cases it is within the sound discretion of the trial court to permit on the re-examination some matter to be

\* *People v. Hanifan*, 98 Mich. 32. Accord: *Campbell v. State*, 23 Ala. 44; *Dole v. Wooldredge*, 142 Mass. 184; *Vaughan v. McCarthy*, 63 Minn. 219, 65 N. W. 249; *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *Foster v. Tanenbaum*, 2 N. Y. App. Div. 168; *Zeipird v. Stotler*, 97 Iowa, 169, 66 N. W. 150; *Collins v. State*, 46 Neb. 37; *Donnelly v. State*, 26 N. J. L. 601; *Ramney v. St. Johnsbury, &c.* R. Co. 67 Vt. 594.

<sup>10</sup> *State v. Denis*, 19 La. Ann. 119; *Dutton v. Woodman*, 9 Cush. (Mass.) 255; *The Queen's Case*, 2 Brod. & B. 297; *Commonwealth v. Wilson*, 1 Gray (Mass.) 337; *Richardson v. Wilkins*, 19 Barb. (N. Y.) 510; *Prince v. Samo*, 7 Ad. & El. 627; *Donnelly v. State*, 2 Dutch (N. J.) 463; *Covanhovan v. Hart*, 21 Pa. St. 495; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *McIlvaine v. Wilkins*, 12 N. H. 474; *Schaser v. State*, 36 Wis. 429; *Sturge v. Buchannan*, 10 Ad. & El. 598, 605; *Hall v. Moriarty*, 57 Mich. 345; *Tuckwood v. Hawthorn*, 67 Wis. 326; *Jackson v. Evans*, 73 N. Car. 128.

In Alabama, a witness for the

state, who, on cross-examination, testifies that he has taken an active part in the prosecution, and that he has unfriendly feelings towards the prisoner, may be asked, on re-examination, whether he feels so unfriendly towards the prisoner as to wish to see an innocent man convicted. *Campbell v. State*, 23 Ala. 44.

A witness cannot be examined directly as to irrelevant matters, though he has been questioned as to them on the previous cross-examination. *Smith v. Dreer*, 3 Whart. (Pa.) 154. See, also, *Great Western, &c. R. Co. v. Haworth*, 39 Ill. 346.

If the testimony of a witness upon re-examination appears to be in some particulars contradictory to that given by him at first, no exception lies to a refusal to strike out his testimony as first given, but it is a question of fact, upon the whole of the witness's testimony, whether the first or second statement is correct. *Stockwell v. Holmes*, 33 N. Y. 53.

Where a witness on his cross-examination was asked if the party who called him had spoken to him



introduced which was omitted or forgotten in the examination-in-chief.<sup>11</sup> If it is desired to elicit new matter, the permission of the court should first be obtained. And it has been held not error if the court refuses.<sup>12</sup>

**§ 933. Witness may explain.**—If the witness on cross-examination has used certain expressions, then, upon re-examination, he may be

on the subject of the suit, and he answered that he had, the party calling him, on a re-examination was allowed to ask what he had said to the witness. *Somerville, &c. R. Co. v. Doughty*, 22 N. J. L. 495.

In a Michigan case the court, through Judge Cooley, held that it was discretionary with the trial court to permit any question on re-direct examination which would have been proper on the examination-in-chief. *Hemmens v. Bentley*, 32 Mich. 89.

When, upon the trial of a criminal cause, a witness for the prosecution discloses in his cross-examination that he holds unfriendly feelings toward the defendant, it has been held improper upon the re-examination to inquire as to the cause of such unfriendly feelings. *State v. Gregory*, 33 La. Ann. 737.

The practice of the chancery courts is not to allow a witness, whose examination has been taken and closed, to be re-examined without an order of court, obtained on good cause shown. *Hanson v. First Church*, 11 N. J. Eq. 441; *Hallock v. Smith*, 4 Johns. (N. Y.) Ch. 649; *Phettiplace v. Sayles*, 4 Mass. (U. S.) 312; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573.

<sup>11</sup> *Clark v. Vorce*, 15 Wend. (N. Y.) 193; *Blake v. Stump*, 73 Md. 160, 20 Atl. 788; *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Hemmens v. Bentley*, 32 Mich. 89; *Col-*

*lins v. State*, 46 Neb. 37; *Beal v. Nichols*, 2 Gray (Mass.) 262; *State v. Scott*, 24 La. Ann. 161; *Osborne v. O'Reilly*, 34 N. J. Eq. 60; *Wallace v. State*, 28 Ark. 531; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *Graham v. McReynolds*, 90 Tenn. 673; *Morehouse v. Morehouse*, 70 Conn. 420, 39 Atl. 516; *Kidd v. State*, 101 Ga. 528, 28 S. E. 990; *Wash. Ice Co. v. Bradley*, 171 Ill. 255, 49 N. E. 519; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Campbell v. Brown*, 183 Pa. St. 112; *McGowan v. Railroad Co.* 91 Wis. 147, 64 N. W. 891.

Where counsel inadvertently omitted to take down answers to certain questions in writing, and asked permission to re-examine the witness concerning the same, in order to reduce them to writing, it was held that it was in the discretion of the court to grant or refuse such permission, and there was no error in refusal. *Jesse v. State*, 20 Ga. 156.

It has also been held that the court may, in its discretion, permit a witness to return to the stand and testify, after a case has been submitted to the jury, and they have been addressed by counsel. *Colclough v. Rhodus*, 2 Rich. (S. Car.) 76; *Thompson v. Poston*, 1 Duv. (Ky.) 389.

<sup>12</sup> *Beal v. Nichols*, 2 Gray (Mass.) 262; *Schaser v. State*, 36 Wis. 429.

interrogated so that he may explain the sense and meaning of the expressions so used.<sup>13</sup> So, in a recent criminal case, it was held proper to permit a witness for the state to explain on re-direct examination that she had been in so much trouble over the affair that in testifying in chief she had overlooked a circumstance brought out on cross-examination, which modified the incriminating force of her testimony, and which she had testified to on a former trial.<sup>14</sup>

**§ 934. Witness may correct.**—On re-examination a witness may state facts and circumstances which go to make a correction as to any inferences which may be adduced from the cross-examination.<sup>15</sup> So, also, a witness may be asked his reason for making a certain statement on cross-examination or for an opinion he has expressed.<sup>16</sup> And if, on cross-examination, he has admitted that he made statements not in harmony with his previous testimony, an explanation as to the reason and surrounding circumstances may properly be adduced.<sup>17</sup>

<sup>13</sup> *Reeve v. Dennett*, 141 Mass. 207; *People v. Hanifan*, 98 Mich. 32, 56 N. W. 1048; *Walker v. State*, 136 Ind. 663, 36 N. E. 356; *Robinson v. Dugan* (Cal.) 35 Pac. 902; *Pullen v. Pullen*, 29 N. J. Eq. 541, 12 Atl. 138; *State v. Chiles*, 44 S. Car. 338; *Norwegian Plow Co. v. Hawthorn*, 71 Wis. 529; *Gilbert v. Sage*, 5 Lans. (N. Y.) 287; *Campbell v. State*, 23 Ala. 44; *United States v.* 18 Barrels of High Wines, 8 Blatchf. (U. S.) 475; *State v. Rorabacher*, 19 Iowa, 154; *Favors v. State*, 20 Tex. App. 155; *Dunn v. Pipes*, 20 La. Ann. 276; *Kingston v. Tappen*, 1 Johns Ch. (N. Y.) 368; *McManus v. Finan*, 4 Iowa, 283; *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Westbrook v. Aultman*, 3 Ind. App. 83; *Williams v. Clink*, 90 Mich. 297, 51 N. W. 453.

"To allow a witness to be recalled, and to restate a point in his testimony about which the counsel differ in their recollection, is a dangerous practice, and should be allowed, if at all, with great caution, and never with a witness

whose fairness lies under any grounds of suspicion." *Bigelow v. Young*, 30 Ga. 121.

The witness on asking the privilege to rectify a mistake in his testimony will be permitted to do so. *Walker v. Walker*, 14 Ga. 242.

<sup>14</sup> *Merrell v. State* (Tex. Cr. App.) 70 S. W. 979. See, also, *Walker v. State*, 136 Ind. 663, 36 N. E. 356.

<sup>15</sup> *Loy v. Petty*, 3 Ind. App. 241, 29 N. E. 788; *McMurrin v. Rigby*, 87 Iowa, 18, 53 N. W. 1079; *Feather v. Reading*, 155 Pa. St. 187, 26 Atl. 212; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *Simmons v. Havens*, 101 N. Y. 427, 433; *Stillwell v. Farwell*, 64 Vt. 286, 24 Atl. 243.

<sup>16</sup> *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621; *Redman v. Peirsol*, 39 Mo. App. 173; *Hicks v. Hicks* (Tex. Civ. App.), 26 S. W. 227.

<sup>17</sup> *Yeoman v. State*, 21 Neb. 171; *Fillmore v. Union Pac. R. Co.* 2 Wyo. 94, 100; *People v. Wills*, 94 Mich. 630, 54 N. W. 488; *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514; *Armstrong v. Commonwealth*, 16 Ky. L. R. 494.

Where collateral facts were called out in the cross-examination of a witness, tending to create distrust of his integrity, fidelity, or truth, it was held competent for the adverse party to ask of the witness an explanation which might show the consistency of such facts with his integrity, fidelity and truth, although circumstances might thus be proved which were foreign to the principal issue, and which, but for such previous cross-examination, would not have been permitted to be proved.<sup>18</sup>

**§ 935. May re-examine on new matter of cross-examination.**—If relevant new matter is brought out by the cross-examiner, the witness may be examined fully concerning this matter on the re-direct examination.<sup>19</sup> It is also held in some jurisdictions that there may be a re-examination where the door is opened to irrelevant matter on cross-examination. This subject, however, has already been considered in treating the subject of cross-examination.

**§ 936. Re-examination by repetition—Recalling witness.**—According to the better and prevailing rule it is held that a repetition of the direct testimony on the re-examination, while objectionable, is largely in the discretion of the court.<sup>20</sup> This cannot be insisted upon as a matter of right, but it is generally held, as already indicated, that, on the re-examination of a particular witness, it is within the trial court's discretion to permit him to repeat or emphasize or detail more precisely a matter already testified to in chief.<sup>21</sup> So, while a witness cannot, ordinarily, be recalled for re-examination, as a matter of right,<sup>22</sup> permission to do so is often granted, and it is not, ordinarily, an abuse of discretion to grant it.<sup>23</sup>

<sup>18</sup> *United States v. 18 Barrels of High Wines*, 8 Blatchf. (U. S.) 475.

<sup>19</sup> *Bank v. Young*, 36 Iowa, 44; *Hamilton v. Miller*, 46 Kans. 486; *Commonwealth v. Dill*, 156 Mass. 226; *Goodman v. Kennedy*, 10 Neb. 270; *Gray v. Cooper*, 65 N. Car. 183; *Merritt v. Campbell*, 79 N. Y. 625; *Bassham v. State*, 38 Tex. 622; *State v. Hopkins*, 50 Vt. 316. Compare *Smith v. Dreer*, 3 Whar. (Pa.) 154.

<sup>20</sup> *People v. McNamara*, 94 Cal. 509, 512, 29 Pac. 953; *Winslow v. Covert*, 52 Ill. App. 63.

<sup>21</sup> *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Anderson v. Jordan*, 15 S. Dak. 395, 89 N. W. 1015; *Dillard v. State*, 58 Miss. 368, 389; *Collins v. State*, 46 Neb. 37, 64 N. W. 432.

<sup>22</sup> *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Gray v. Murray*, 4 Johns. Ch. (N. Y.) 412; *President v. Parks*, 74 Md. 282, 22 Atl. 399; *Girault v. Adams*, 61 Md. 1, 9; *Beaulieu v. Parsons*, 2 Minn. 37.

<sup>23</sup> *State v. Rorabacher*, 19 Iowa, 154; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *Hollingsworth v. State*, 79 Ga. 605, 4 S. E. 560; *Swift*

**§ 937. Re-examination as to cause of hostility in criminal cases.**

It has been held that, if on the cross-examination in a criminal prosecution a witness admits his hostility to the accused, it is not competent for the prosecuting attorney to re-examine him concerning the cause of his ill-feeling.<sup>24</sup> The court, in the case referred to, took the view that it was proper on cross-examination to show the unfriendly state of the feelings of the witness toward the defendant, but that the inquiry should cease at that point. In other cases, however, a different view is taken,<sup>25</sup> and in one of them it is said: "The fact that a fight had occurred between the parties was elicited by the defendant on cross-examination of the state's witness, which was pertinent and relevant, in order to show the bias of the witness towards the defendant. The bare fact of a difficulty being thus established, it was not altogether irrelevant to show how it came about, as it had a bearing upon fixing the extent of the bias, and for which purpose alone it was admissible."<sup>26</sup>

**§ 938. Discretion of court—When reviewed on appeal.**—The exercise of a trial court's discretion in allowing a re-examination will not, in the absence of abuse, be reviewed in the appellate court.<sup>27</sup> It would require a very unusual state of affairs to cause a reversal on this ground, but there might be such a harmful abuse of discretion as would justify a reversal.<sup>28</sup>

*v. Ratliff*, 74 Ind. 426; *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Riley v. State*, 88 Ala. 193, 7 So. 1049.

<sup>24</sup> *State v. Jackson*, 39 La. Ann. 910, 3 So. 59; *State v. Gregory*, 33 La. Ann. 737. The judgment of conviction was reversed on this ground.

<sup>25</sup> *State v. Warren*, 41 Ore. 348, 69 Pac. 679; *People v. Hanifan*, 98 Mich. 32, 56 N. W. 1048 (on the ground that the defense opened the door). See, also, *Campbell v. State*, 23 Ala. 44; *Ellsworth v. Potter*, 41 Vt. 685; *State v. Sargent*, 32 Me. 429; *Beasley v. People*, 89 Ill. 571.

<sup>26</sup> *State v. Warren*, 41 Ore. 348, 69 Pac. 679, 682.

<sup>27</sup> *Howell v. Commonwealth*, 5

*Gratt.* (Va.) 664; *Freleigh v. State*, 8 Mo. 606; *State v. Silver*, 3 Dev. (N. Car.) 332; *Law v. Merrills*, 6 Wend. (N. Y.) 268; *Breidert v. Vincent*, 1 E. D. Smith (N. Y.) 542; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267; *Gayle v. Bishop*, 14 Ala. 552; *Brown v. Burrus*, 8 Mo. 26. See, also, *George v. State*, 61 Neb. 669, 85 N. W. 840.

<sup>28</sup> In one case where it appeared that a witness was recalled for the purpose of having him restate his testimony the court said: "It is a dangerous practice, and should be allowed, if at all, with great caution, and never with a witness whose fairness lies under any grounds of suspicion." *Bigelow v. Young*, 30 Ga. 121. Compare *Aiken*

§ 939. **Re-cross-examination.**—A re-cross-examination is, in a sense, a continuation of the cross-examination, its purpose being to cover the matters brought out on the re-direct examination. To allow it is within the discretion of the trial court, the tendency being to allow it whenever it tends to bring out the truth and to further justice.<sup>29</sup> If, on the re-direct examination, no new evidence is introduced, it is customary and within the discretion of the court to close the examination without any further questioning on the part of either party. However, if new facts; material to the issue, have been produced, the other party is usually given the right of re-cross-examination.<sup>30</sup> If a witness has returned to the stand to correct his testimony upon a single point, the court commits no error by refusing to let him be re-cross-examined, except on that single point.<sup>31</sup>

*v. Stewart*, 63 Pa. St. 30; *Hudspeth v. Allen*, 26 Ind. 165; *Hughes v. Mulvey*, 1 Sandf. (N. Y.) 92; *Edmondson v. State*, 7 Tex. App. 116; *Jesse v. State*, 20 Ga. 156.

<sup>29</sup> *Brown v. Burrus*, 8 Mo. 26; *State v. Haab*, 105 La. Ann. 230, 29 So. 725; *Gayle v. Bishop*, 14 Ala. 552; *Thornton v. Thornton*, 39 Vt. 122; *Wood v. McGuire*, 17 Ga. 303. And the exercise of this discretion will not ordinarily be reviewed by an appellate court. Authorities cited in this note, *supra*; also *Law v. Merrill*, 6 Wend. (N. Y.) 268; *State v. Silver*, 3 Dev. L. (N. Car.) 332; *Covanhovan v. Hart*, 21 Pa. St. 495; *Howel v. Commonwealth*, 5 Gratt. (Va.) 664.

"After a witness on a trial has

been cross-examined, it is in the discretion of the presiding judge to permit or refuse a second cross-examination. It cannot be demanded as a right." *State v. Hoppiss*, 5 Ired. (N. Car.) 406.

"No exception lies to a ruling which excludes the further cross-examination of a witness, whose direct and cross-examination have several times been taken up and dropped." *Commonwealth v. Nickerson*, 5 Allen (Mass.) 518.

<sup>30</sup> *Wood v. McGuire*, 17 Ga. 303, 318; *State v. Hoppiss*, 5 Ired. (N. Car.) 406; *Commonwealth v. Nickerson*, 5 Allen (Mass.) 518; *Thornton v. Thornton*, 39 Vt. 122.

<sup>31</sup> *Thornton v. Thornton*, 39 Vt. 122.

## CHAPTER XLIII.

### RECALLING WITNESSES—REBUTTAL AND SURREBUTTAL.

Sec.	Sec.
940. Recalling witnesses—The rule.	945. Recalled by the court—For self—For jury.
941. Time of recalling.	946. Rebuttal and surrebuttal—Meaning of terms.
942. How to object to recalling.	947. The rule.
943. Witness recalled becomes witness of party recalling.	948. Discretion of court.
944. When permitted.	949. Surrebuttal.

§ 940. **Recalling witnesses—The rule.**—After a witness has been examined, cross-examined, and re-examined, and has been dismissed, it may be desirable to recall him to the stand for further examination. This may generally be granted or refused in the trial court's discretion.<sup>1</sup> When, through inadvertence or mistake, a party has dismissed his witness without examining him concerning a material fact within his knowledge, the court may allow him to be called to the stand again at any time before the retirement of the jury.<sup>2</sup> Since a witness is recalled by the permission of the court, the court is entitled to exercise a large discretion as to the manner in which, and the extent to which, the favor granted shall be made use of.<sup>3</sup> The practice in courts of equity seems to be not to permit a witness to be recalled

<sup>1</sup> *Brown v. State*, 72 Md. 468, 475, 20 Atl. 186. See, also, ante § 936. But see *State v. Coats*, 174 Mo. 396, 74 S. W. 864; *Jones v. Smith*, 64 N. Y. 180, 184 (may be recalled as matter of right to testify to new matter on rebuttal).

<sup>2</sup> *Freleigh v. State*, 8 Mo. 606; *Collins v. Johnson*, Hempst. (U. S.)

281; *State v. Scott*, 24 La. Ann. 161; *Curren v. Connery*, 5 Binn. (Pa.) 488. See, also, *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S. E. 238; *Abbott v. Commonwealth* (Ky.), 62 S. W. 715.

<sup>3</sup> *Cummings v. Taylor*, 24 Minn. 429.

and re-examined without an order of court, secured by showing good cause.<sup>4</sup>

**§ 941. Time of recalling.**—The court may, in a proper case, allow a witness to be recalled at any time before the jury retire. Thus, it has even been held that a witness may be allowed to return to the stand and testify, after a case has been submitted to the jury, and they have been addressed by counsel.<sup>5</sup>

**§ 942. How to object to recalling.**—Under the rule requiring all objections to evidence to be specific, it has been held that an objection to the recalling of a witness to be valid must state specifically the grounds of objection.<sup>6</sup>

**§ 943. Witness recalled becomes witness of party recalling.**—It has been held that a witness recalled becomes the witness of the party calling him back against the objection of the other party, and that such witness cannot be impeached by the party so recalling him.<sup>7</sup> But this, we think, must depend upon the particular circumstances, and cannot be stated as an invariable rule in all cases. If, for instance, a cross-examiner had forgotten to propound some question that could be legitimately asked on cross-examination, and should ask and obtain permission to recall the witness for further cross-examination, it would not follow that he would make the witness his own by asking such question.<sup>8</sup>

**§ 944. When permitted.**—The court may allow a witness to be recalled for the purpose of laying the foundation for his impeachment.<sup>9</sup> Where a witness has misstated a matter and wishes to cor-

<sup>4</sup> Phettiplace v. Sayles, 4 Mason (U. S.) 312; Hallock v. Smith, 4 Johns. (N. Y.) Ch. 649; Hanson v. First Church, 3 Stock. (N. J.) 441.

<sup>5</sup> Thompson v. Poston, 1 Duv. (Ky.) 389; Colclough v. Rhodus, 2 Rich. (S. C.) 76. See, also, Volusia County Bank v. Bigelow (Fla.), 33 So. 704; ante § 932; Glenn v. Stewart, 167 Mo. 584, 67 S. W. 237; Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 303. But compare Griffin v. Barbee (Tex. Civ. App.), 68 S. W. 698.

<sup>6</sup> Osborne v. O'Reilly, 34 N. J. Eq. 60.

<sup>7</sup> Barker v. Bell, 46 Ala. 216.

<sup>8</sup> See State v. Coats, 174 Mo. 396, 74 S. W. 864. As to recalling and cross-examining on matters as a basis for impeachment, see Crawleigh v. Galveston, &c. R. Co. (Tex. Civ. App.), 67 S. W. 140 (permitting it).

<sup>9</sup> Richmond, &c. R. Co. v. Vance, 93 Ala. 147; State v. Ruhl, 8 Iowa, 447; State v. Horne, 9 Kans. 119; State v. Jones, 64 Mo. 391; Huff v. Latimer, 33 S. Car. 255; Fuller v. State, 30 Tex. App. 559. See Covanhovan v. Hart, 21 Pa. St. 495, 502.

rect his testimony, he may be called in the court's discretion.<sup>10</sup> He may be recalled to explain an apparent contradiction in his testimony. So, it has been held that this permission should be given where the correction is to be made on a fact as to which he was not cross-examined, and as to which the court, the clerk, and the counsel disagreed as to whether it had been taken down correctly.<sup>11</sup>

While old matter, that is, previous testimony, in the court's discretion may be explained and corrected, a mere repetition of the prior testimony of the witness will not, ordinarily, be permitted by the court.<sup>12</sup> The court, however, may allow a party to recall a witness to secure evidence concerning a matter upon which he has previously been examined, and the exercise of such discretion is not reviewable.<sup>13</sup>

The court, in a proper exercise of its discretionary power, as a rule, permits a recalling of the witness to testify to new matter, such as arises out of the testimony of other witnesses, or as to facts concerning which he has not previously testified.<sup>14</sup>

**§ 945. Recalled by the court—For self—For jury.**—The court may recall a witness in order that the witness may explain to him a prior statement made when on the stand the first time.<sup>15</sup> So, the court may recall a witness in order that the witness may restate his testimony to the jury, who, after retiring, have returned to inquire what the witness said in his testimony or any part of it.<sup>16</sup> This restatement to the jury is made in the presence of the court, at any time before delivering their verdict.

**§ 946. Rebuttal and surrebuttal—Meaning of terms.**—Evidence in rebuttal is evidence offered on the part of or behalf of the plaintiff (or prosecution) for the purpose of contradicting or counteracting the evidence adduced by the defendant. Evidence in surrebuttal is evidence offered on behalf of the defendant for the purpose of

<sup>10</sup> Walker v. Walker, 14 Ga. 242; Miller v. Hartford Fire Insurance Co. 70 Iowa, 704; Dunn v. Pipes, 20 La. Ann. 276; State v. Nanert, 6 Mo. App. 593; Rice v. Rice (N. J.), 23 Atl. 946.

<sup>11</sup> Dunn v. Pipes, 20 La. Ann. 276.

<sup>12</sup> Hughes v. Mulvey, 1 Sandf. (N. Y.) 92; Hudspeth v. Allen, 26 Ind. 165.

<sup>13</sup> 8 Ency. Pl. & Pr. p. 130, n. 1.

<sup>14</sup> State v. Scott, 24 La. Ann. 161; Sawyer v. Sawyer, Walk. (Mich.) 48; Jenkins v. Eldredge, 3 Story (U. S.) 299.

<sup>15</sup> Snodgrass v. Commonwealth, 89 Va. 679, 685, 17 S. E. 238.

<sup>16</sup> Thompson v. Poston, 1 Duv. (Ky.) 389; Van Huss v. Rainbolt, 2 Coldw. (Tenn.) 139; State v. Silver, 3 Dev. (N. Car.) 332.



contradicting or counteracting the evidence adduced on the rebuttal of the plaintiff.

§ 947. **The rule.**—After both sides have produced their evidence, setting forth facts to establish their cases, the evidence in rebuttal is received.<sup>17</sup> Rebutting testimony means not merely that testimony which contradicts the testimony on the opposite side and corroborates one's own, but also testimony which denies some affirmative fact which the other party has endeavored to prove.<sup>18</sup>

It has been held, however, that rebutting testimony must tend directly to weaken or impeach the proof of the other party, and that merely cumulative testimony is not matter of rebuttal.<sup>19</sup>

§ 948. **Discretion of court.**—It is for the court to determine what is rebuttal testimony, and it is largely within the discretionary power of the court to receive or to reject relevant evidence in rebuttal that is not properly rebuttal evidence.<sup>20</sup> The same is also true as to permitting a witness to be recalled to give in rebuttal what should have

<sup>17</sup> *Lott v. Macon*, 2 Strobb. (S. Car.) 178; *Dunham v. Forbes*, 25 Tex. 23.

In a capital trial, a witness, whose name has not been furnished the defendants, may be examined to rebut some matter set up by them, although the testimony of the witness be such that it might have been introduced to prove the defendants guilty, provided it also has a direct tendency to rebut such defense. *State v. Hartigan*, 19 N. H. 248.

<sup>18</sup> *Macullar v. Wall*, 6 Gray (Mass.) 507; *Walker v. Walker*, 14 Ga. 242, 250; *Hathaway v. Hemingway*, 20 Conn. 191; *Marshall v. Davies*, 78 N. Y. 414, 418; *Pierce v. Wood*, 23 N. H. 519; *Babcock v. Babcock*, 46 Mo. 243.

<sup>19</sup> *Craighead v. Wells*, 21 Mo. 404.

<sup>20</sup> *Marshall v. Davies*, 78 N. Y. 414, 420; *Neilson v. Nebo, &c. Co.* 25 Utah, 37, 69 Pac. 289; *Stein v. McArdle*, 24 Ala. 344; *Reynolds v. State*, 68 Ala. 502; *Rust v. Shack-*

*ford*, 47 Ga. 538; *White v. Bailey*, 10 Mich. 155; *Artz v. Chicago, &c. R. Co.* 44 Iowa, 284; *Koenig v. Bauer*, 57 Pa. St. 168; *State v. Alford*, 31 Conn. 40; *Babcock v. Babcock*, 46 Mo. 243; *Young v. Edwards*, 72 Pa. St. 257; *Strong v. Connell*, 115 Mass. 575; *Graham v. Davis*, 4 Ohio St. 362; *Pleasant v. State*, 15 Ark. 624; *Thomasson v. State*, 22 Ga. 499; *Stein v. McArdle*, 24 Ala. 344.

Where one, after the rebutting evidence of the opposite party is all in, recalls a witness of his own, it is discretionary with the court to allow him to ask questions which, at the first examination, might have been proper. *White v. Bailey*, 10 Mich. 155.

"A witness who has been examined-in-chief, for the state, may be re-examined in rebuttal, though he has remained in court in the meantime, and may on such re-examination make use of a diagram for the first time; and it is then the right

been given in chief. But evidence should not be given piecemeal, and a party cannot, as a matter of right, give in rebuttal evidence that should have been given in chief.<sup>21</sup>

The rebuttal testimony should rebut the testimony advanced by the other side, and should consist of nothing which might properly have been advanced as proof in chief. Yet it is generally held that the trial judge may permit this, and such action of the court is not ground of error.<sup>22</sup> And where the defendant introduces evidence that is irrelevant, he cannot, ordinarily, complain if the defendant in rebuttal is permitted to follow him through the open door.<sup>23</sup>

§ 949. **Surrebuttal.**—If the plaintiff in rebuttal puts new facts in evidence, or builds up a new case, different from that at first made out, it has been held that the defendant, as a matter of right, may

of the other party to surrebut in the same way." *Thomas v. State*, 27 Ga. 287.

<sup>21</sup> In *Marshall v. Davies*, 78 N. Y. 414, the court in speaking of the rules governing the production of rebutting testimony, said: "In the present case, after having testified to one conversation, which was not denied on the other side, the defendant was not entitled, as matter of right, to prove another as to which he had not previously testified, even though it tended to support his original statement. This was not evidence in rebuttal. The testimony on the part of the plaintiff was that other conversations might have been had, but that no conversation of the nature testified to by the defendant ever took place. This was a mere denial, and not proof of any affirmative fact which the defendant had the right to rebut. These rules may, in special cases, be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception." See, also,

*Fitzpatrick v. Papa*, 89 Ind. 17; *Ashworth v. Kettridge*, 12 Cush. (Mass.) 193; *Beaulien v. Parsons*, 2 Minn. 37; *People v. Mather*, 4 Wend. (N. Y.) 229, 249; *Rowe v. Brenton*, 3 Mann & Ry. 133, 139; *Seattle, &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498; *Barlow Bros. v. Parsons*, 73 Conn. 696, 49 Atl. 205.

<sup>22</sup> *Huntsman v. Nichols*, 116 Mass. 521; *Agate v. Morrison*, 84 N. Y. 672; *Finley v. Stewart*, 56 Pa. St. 183; *Goss v. Turner*, 21 Vt. 437; *Dane v. Trest*, 35 Me. 198; *Blake v. Powell*, 26 Kans. 320; *Dozier v. Jerman*, 30 Mo. 216; *Dailey v. Grimes*, 27 Md. 440.

<sup>23</sup> *Houston, &c. R. Co. v. Hopson* (Tex. Civ. App.), 67 S. W. 458; *Endowment Bank v. Steele* (Tenn.), 69 S. W. 336; *Hutter v. De Q. Bottle, &c. Co.* 119 Fed. 190. See, also, *Bush v. Delaware, &c. R. Co.* 166 N. Y. 210, 59 N. E. 838; *Supreme Lodge v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532; *Kansas City, &c. Co. v. Carlisle*, 108 Fed. 344.

call witnesses in surrebuttal.<sup>24</sup> If the plaintiff in rebuttal does not introduce anything new it is usually within the discretion of the court to permit or to refuse the introduction of evidence in surrebuttal.<sup>25</sup>

<sup>24</sup> *Kent v. Lincoln*, 32 Vt. 591; *Fields*, 28 Ga. 237. See, also, *Thom-  
City of Rock Island v. Starkey*, 189 as v. State, 27 Ga. 287.  
Ill. 515, 59 N. E. 971; *Walker v.*

<sup>25</sup> *Koenig v. Bauer*, 57 Pa. St. 168;  
*Thayer v. Davis*, 38 Vt. 163.

## CHAPTER XLIV.

### CREDIBILITY.

Sec.		Sec.	
950.	Meaning of term.	961.	Where witness is an accomplice of defendant.
951.	Extent of application.	962.	Where witness is a spy or informer.
952.	What may be shown to affect credibility—In general.	963.	Where witness is a party—In civil cases.
953.	Where witness swears to facts he does not recollect.	964.	Where witness is a party—In criminal cases.
954.	Where witness swears positively to some things and not others.	965.	Question of credibility is for jury.
955.	Where witness is hesitating and nervous.	966.	Weight or value of testimony—Question for jury.
956.	Where witness wilfully testifies falsely.	967.	Comparative weight of testimony in open court and by deposition.
957.	Where witness is biased or interested.	968.	Weight of testimony—Number of witnesses.
958.	Where testimony of witnesses is in conflict.	969.	Positive and negative testimony.
959.	Disinterested witness.		
960.	Where witness is an employé of party.		

§ 950. **Meaning of term.**—Credibility is that quality in a witness which renders his evidence worthy of belief. After the competency of a witness is determined, the consideration of his credibility arises and not before.<sup>1</sup> The two matters are very different and fall under different provinces, the question of competency usually being for the court, and the question of credibility usually being for the jury.

<sup>1</sup> Black Law Dict.

§ 951. **Extent of application.**—Generally, the question of the credibility of a witness is much broader in its application than formerly. Objections that formerly went to the competency of a witness now go to his credibility, and the tendency of modern judicial opinion and legislation is to let almost every matter which may affect the testimony of a witness, except such as affects his mental qualification, go to his credibility.<sup>2</sup> It is, perhaps, proper to observe, however, that interest still disqualifies, to some extent, in most of the states, especially where the controversy grows out of matters involving claims against decedent's estates.

§ 952. **What may be shown to affect credibility—In general.** Many matters may be shown to affect the credibility of a witness. The business in which a witness is engaged may be shown for the purpose of affecting his credibility.<sup>3</sup> So, also, his bad character,<sup>4</sup> and his reputation for truth and veracity.<sup>5</sup> It has likewise been held that previous conduct of the witness towards one of the parties,<sup>6</sup> or the fact that the witness tries to conceal or shun something that might tend to implicate him criminally, may be shown in order to lessen his credibility.<sup>7</sup> Intoxication, either at the time the witness is testifying or at the time of the event about which he is testifying, may

<sup>2</sup> Mr. Bentham, in his work on evidence, written in the earliest part of this century, in speaking of the competency of witnesses says that "in the character of objections to competency, no objections ought to be allowed."

<sup>3</sup> *United States v. Duff*, 19 Blatchf. (U. S.) 9; *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432. But see *Bergstrand v. Townsend*, 70 Ark. 600, 70 S. W. 307.

The jury may consider the fact that the witness has been convicted of a crime. *People v. McLane*, 60 Cal. 412.

The fact that the witness is a clergyman does not increase his credibility. *Snead v. Creath*, 1 Hawks (N. Car.) 309.

A witness is not to be discredited because he is in the lottery business; the question must be left to

the jury. *Upington v. Keenan* (Sup.), 21 N. Y. Supp. 691.

<sup>4</sup> *Kittering v. Parker*, 8 Ind. 44; *Donohue v. Henry*, 4 E. D. Smith (N. Y.), 162; *Jones v. State*, 13 Tex. 168; *State v. Larkin*, 11 Nev. 314; *State v. Shields*, 45 Conn. 256; *Smithwick v. Evans*, 24 Ga. 461; *State v. Randolph*, 24 Conn. 363; *Craft v. State*, 3 Kans. 450.

<sup>5</sup> *Brown v. State*, 18 Ohio St. 496; *State v. Miller*, 53 Iowa, 209; *People v. Robles*, 34 Cal. 591.

A prostitute, because such, is not to be discredited; she may be as credible as any one. *State v. Shields*, 45 Conn. 256.

<sup>6</sup> *Breen v. People*, 4 Park. (N. Y.) 380.

<sup>7</sup> *Moses v. State*, 58 Ala. 117; *Miller v. Miller*, 5 C. E. Gr. (N. J.) 216; *Davie v. Jones*, 68 Me. 393; *Borton v. Borton*, 48 Iowa, 697; *Sipple v.*

greatly impair his credibility.<sup>8</sup> But the fact that the witness is addicted to the use of opium, unless there is some very noticeable effect present, is not a competent impeaching matter.<sup>9</sup> The interest of a witness may be shown to impeach his credit.<sup>10</sup> A witness may so contradict himself as to justify the jury in disbelieving him.<sup>11</sup> The witness may be attacked by asking him questions to test his memory and to establish its weakness.<sup>12</sup> So, if a party fails to testify, or fails to call witnesses who are accessible to him, and who have knowledge

State, 99 N. Y. 284, 1 N. E. 892; McMaster v. Stewart, 11 La. Ann. 546.

<sup>8</sup> State v. Castello, 62 Iowa, 404. State v. McNinch, 12 S. Car. 89.

The fact that the witness is in the habit of drinking beer does not affect his credibility. People v. Kohler, 93 Mich. 625, 53 N. W. 826.

<sup>9</sup> McDowell v. Preston, 26 Ga. 528; State v. King, 88 Minn. 175, 92 N. W. 965. Compare Sealy v. State, 1 Ga. 213; Pleasant v. State, 13 Ark. 360; Brock v. State, 26 Ala. 104; Blake v. Everett, 1 Allen (Mass.) 248; Ellsworth v. Potter, 41 Vt. 685. It has been held that the absence of a religious belief cannot be shown for the purpose of impeaching a witness. People v. Copey, 71 Cal. 548.

<sup>10</sup> Hunter v. Wetsell, 84 N. Y. 549, where the court said, "The interest of a perfectly credible and innocent witness may, and often does, color his recollection and mold and modify his statements, sometimes even insensibly to himself. The fact of such interest, where there is a contradiction in the evidence, is a proper subject for the consideration of the jury." See, also, Geary v. People, 22 Mich. 220; Meltzer v. Doll, 91 N. Y. 365; Johnson v. Wiley, 74 Ind. 233; State v. Tosney, 26 Minn. 262; Suit v. Bormell, 53 Wis. 180; In re Snelling's Will, 136 N.

Y. 515, 32 N. E. 1066; Mullins v. Commonwealth (Ky. App.), 67 S. W. 824.

In a trial for murder, if a defendant's counsel testifies as a witness, as affecting his credibility, it is competent to show that he had made a wager on the result of the trial and therefore was interested in the result. People v. Parker, 137 N. Y. 535, 32 N. E. 1013.

<sup>11</sup> Burtus v. Tisdall, 4 Barb. (N. Y.) 571; Terry v. State, 13 Ind. 70; French v. Millard, 2 Ohio St. 44; George v. State, 39 Miss. 570; Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461.

<sup>12</sup> Rivara v. Ghio, 3 E. D. Smith (N. Y.) 264; Isler v. Dewey, 75 N. Car. 466; Alleman v. Stepp, 52 Iowa, 626; Terry v. McNiel, 58 Barb. (N. Y.) 241; Fairchild v. Bascomb, 35 Vt. 398; People v. Hite, 8 Utah, 461, 33 Pac. 234. It is largely within the discretion of the court. Southern R. Co. v. Brantley, 132 Ala. 655, 32 So. 300; Frick v. Kabaker, 116 Iowa, 494, 90 N. W. 498; People v. Rader, 136 Cal. 253, 68 Pac. 707.

In Bell v. Rinner, 16 Ohio St. 45, it was held that the credibility of a competent witness could not be impeached by general evidence that the witness is not possessed of ordinary intelligence or powers of mind.

of material facts, the jury may sometimes draw an unfavorable inference from such conduct,<sup>13</sup> especially if the other party could not also call the witness. The near relationship of the witness to one of the parties is no absolute ground for viewing the testimony of the witness with suspicion, but it is a circumstance to be considered by the jury.<sup>14</sup> The wealth of a witness does not affect his credibility.<sup>15</sup> The same general rules as to credibility ordinarily prevail both in civil and criminal cases.<sup>16</sup>

**§ 953. Where witness swears to facts he does not recollect.**—Where the jury have reason to believe that a witness swears to facts which he does not recollect or know of his own knowledge, they may give little or no credit to his testimony. So, if a witness swears too positively to things which occurred years ago, such as dates and the like, his testimony may receive but little credit.<sup>17</sup>

**§ 954. Where a witness swears positively to some things and not others.**—And where a witness swears positively to every fact relating to the matter in regard to which he is called to testify, and fails to remember other things happening at the same time, his testimony

Mere lack of intelligence alone ought not to be of much weight in impeaching a witness. *Chicago, &c. R. Co. v. Bert*, 69 Ill. 388.

<sup>13</sup> *Perkins v. Hitchcock*, 49 Me. 468; *Whitney v. Bayley*, 4 Allen (Mass.) 173; *Seward v. Garlin*, 33 Vt. 583. See, also, ante, Vol. I, §§ 94, 227.

<sup>14</sup> *Kansas, &c. R. Co. v. Little*, 19 Kans. 267; *Gangwere's Estate*, 14 Pa. St. 417.

The decisions in the state of Louisiana seem to hold that relationship to one of the parties does necessarily impair the credibility of the witness. *Ward v. Valentine*, 7 La. Ann. 184; *Tardif v. Bandoïn*, 9 La. Ann. 127.

<sup>15</sup> *Van Duzor v. Allen*, 90 Ill. 499.

Nor is his credibility affected by his belief in spiritualism. *Blaisdell v. Raymond*, 9 Abb. Pr. (N. Y.) 178, n.

<sup>16</sup> *Lewis v. Lewis*, 9 Ind. 105.

<sup>17</sup> *Parker v. Chambers*, 24 Ga. 518; *Chandler v. Hough*, 7 La. Ann. 441; *Willett v. Fister*, 18 Wall. (U. S.) 91.

Where an unimpeached witness states a fact as of his own knowledge, it must be taken that he had competent means of information and knowledge of the fact, unless the contrary appears. *Kottwitz v. Bagby*, 16 Tex. 656.

Confusion or conflict as to dates cannot affect very strongly the credibility of a witness when the events of which he was speaking transpired more than 30 years before. *Black v. Black*, 38 Ala. 111.

Where a witness only slightly misstates the facts, it is not necessarily ground for discrediting him. *State v. McDevitt*, 69 Iowa, 549. But, as a rule, it is the province of the jury to decide upon the effect of such mistakes or misstatements.

may be greatly weakened.<sup>18</sup> But, it does not necessarily follow that he should be absolutely discredited.<sup>19</sup>

**§ 955. Where witness is hesitating and nervous.**—Where a witness shows by manner or appearance that he is doubtful or uncertain as to his testimony, or where he appears nervous and embarrassed, and his statements are incoherent or inconsistent, his testimony may ordinarily be weighed with a great deal of care,<sup>20</sup> but the jury should not be instructed too positively on the subject, although they may doubtless be instructed that they are entitled to consider such matters and the manner and the conduct of the witness in general while testifying. So the inherent improbabilities of his testimony may discredit him.<sup>21</sup>

**§ 956. Where witness wilfully testifies falsely.**—Where a witness knowingly and wilfully testifies falsely to a material fact in regard to which he is interrogated, the jury may apply the maxim “*falsus in uno falsus in omnibus*” to his testimony, and totally disregard and reject it.<sup>22</sup> But care should be observed in applying this rule, and

<sup>18</sup> *Gibbons v. Potter*, 3 Stew. (N. J. Eq.) 204. See *Pond v. State*, 55 Ala. 196.

<sup>19</sup> See *Moran v. Catholic Societe, &c.* 107 La. 286, 31 So. 658.

<sup>20</sup> *Evans v. Lipscomb*, 31 Ga. 71; *Louisville, &c. R. Co. v. Hurst* (Ky.), 20 S. W. 817; *United States v. Ybanez*, 53 Fed. 536.

Compare *First Nat. Bank v. Haight*, 55 Ill. 191; *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238. The demeanor of a witness on the stand is always a matter to be considered by the jury in determining the value to be given his testimony, but the jury are the judges of its effect upon his credibility.

Where the statements of the witness are grossly improbable and he appears to be interested in the issue of the suit, the jury are at liberty to discredit his testimony even if it is uncontradicted and unimpeached. *Elwood v. Western Union Tel. Co.* 5 N. Y. 549.

The fact that the witness refused to show books, from which memoranda had been made and used in refreshing his memory, may be considered by the jury in determining his credibility. *Davie v. Jones*, 68 Me. 393.

<sup>21</sup> *In re Leslie*, 119 Fed. 406. See, also, *Williams v. Bishop*, 17 Colo. App. 503, 68 Pac. 1063; *Patton v. State*, 117 Ga. 230, 43 S. E. 533.

<sup>22</sup> *Gillett v. Wimer*, 23 Mo. 77; *Paulette v. Brown*, 40 Mo. 52; *Dell v. Oppenheimer*, 9 Neb. 454; *Minich v. People*, 8 W. Coast R. 580; *State v. Mix*, 15 Mo. 153; *State v. Shoenwald*, 31 Mo. 147; *People v. Soto*, 59 Cal. 367; *Callanan v. Shaw*, 24 Iowa, 441; *People v. Strong*, 30 Cal. 151; *Pope v. Dodson*, 58 Ill. 360; *Link v. Harrington*, 47 Mo. App. 262.

In *Mann v. Arkansas Valley, &c. Co.* 24 Fed. 261, 267, the court, in speaking of a witness wilfully and knowingly giving false testimony,



the court should not invade the province of the jury by instructing them too positively upon the subject.<sup>23</sup>

**§ 957. Where witness is biased or interested.**—If the witness is

said, "That is the law in such matters,—that if a witness wilfully, purposely, knowingly testifies falsely, he may be discredited altogether. Of course, a witness is not to be discredited upon a mere mistake that he may make,—a slip of the memory, want of recollection, some infirmity of his mind; but if he deliberately and purposely misstates a fact, thereby he shows himself to be unworthy of belief."

Even if the fact to which he knowingly and wilfully testifies is an immaterial one, the jury, it is said, may still disregard the whole of his testimony. *Huber v. Leuber*, 3 MacArth. (D. C.) 484.

The maxim "*falsus in uno falsus in omnibus*" is said not to be a rule of evidence in North Carolina. *State v. Spencer*, 64 N. Car. 316.

"It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from de-

liberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turns out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?" *The Santissima Trinidad*, 7 Wheat. (U. S.) 283.

Where a witness makes a false statement he should not be entirely discredited unless he did it knowingly and it was of a matter material to the issue on trial. *Spencer v. Dougherty*, 23 Ill. App. 399; *State v. Peace*, 1 Jones (N. Car.) 251; *Lemmon v. Moore*, 94 Ind. 40. See, also, *Peoples v. State* (Miss.), 33 So. 289.

<sup>23</sup> *Knowles v. People*, 15 Mich. 408; *Brown v. Hannibal, &c. R. Co.* 66 Mo. 588; *Childs v. State*, 76 Ala. 93; *People v. Hicks*, 53 Cal. 354; *Swan v. People*, 98 Ill. 610; *State v. Banks*, 40 La. Ann. 736, 5 So. 18; *Church v. Chicago, &c. R. Co.* 119 Mo. 203, 23 S. W. 1056; 2 Elliott's Gen. Pr. § 771.

shown to be interested or biased on one side or the other, his testimony will be considered with great caution,<sup>24</sup> but it is for the jury to determine how far this affects his credibility. If the witness is interested the court may instruct the jury that they have the right to consider the interest of the witness as a circumstance in determining the weight they will give to his testimony, but it is error to say that it destroys his credibility.<sup>25</sup>

**§ 958. Where testimony of witnesses is in conflict.**—Where there is apparent conflict in the testimony of the witnesses it is the province of the jury to reconcile the conflict if they can, but if they cannot reconcile the conflicting statements, then to decide what witnesses are worthy of belief, and the court cannot rightfully instruct what testimony shall be accepted as trustworthy and what shall be disregarded.<sup>26</sup>

<sup>24</sup> *Robinson v. New York, &c. R. Co.* 20 Blatchf. (U. S.) 338; *United States v. Borger*, 7 Fed. 193; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Dailey v. State*, 28 Ind. 285; *Prowattain v. Tindall*, 80 Pa. St. 295; *State v. Miller*, 53 Iowa, 209.

However, it must be considered by the jury and not by the court. *Kansas, &c. R. Co. v. Little*, 19 Kans. 267; *Haines v. People*, 82 Ill. 430.

<sup>25</sup> *Hunter v. Wetsell*, 84 N. Y. 549; *Commonwealth v. Putnam*, 2 Allen (Mass.) 301; *Douglass v. Fullerton*, 7 Ill. App. 102; *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. State*, 56 Ind. 179; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Robinson v. New York, &c. R. Co.* 20 Blatchf. (U. S.) 338.

"It was the exclusive province of the jury to determine from their knowledge of mankind, from the evidence in the cause, and from the appearance and manner of the witness, what credit was due to his evidence, and whether any, and if so, how much, credence should be withheld in consequence of his interest in the cause. It was, in short,

the exclusive province of the jury to determine whether one interested would or would not be as honest and candid as one not interested." *Greer v. State*, 53 Ind. 420.

<sup>26</sup> *Seal v. State*, 28 Tex. 491; *Brown v. State*, 2 Tex. App. 115; *State v. Vansant*, 80 Mo. 67; *Brenslar v. People*, 117 Ill. 422; *State v. Bohan*, 19 Kans. 28, 34; *Nelson v. Vorce*, 55 Ind. 455; *Millner v. Eylin*, 64 Ind. 197; *Voss v. Prier*, 71 Ind. 128; *Condy v. Iron Mountain, &c. R. Co.* 85 Mo. 79, 85; *Finch v. State*, 81 Ala. 41, 47; *Curry v. Curry*, 114 Pa. St. 367; *Tallon v. Grand Portage, &c. Co.* 55 Mich. 147; *Moore v. Pieper*, 51 Mo. 157; *Hill v. Sutton*, 2 Mo. App. 353; *Solander v. People* 2 Colo. 48, 54.

Where the court gave this instruction, "Both witnesses are gentlemen; it is a matter of memory," it was held that the court was invading the province of the jury. *McRay v. Lawrence*, 75 N. Car. 289. Compare *Johnson v. New York, &c. R. Co.* 39 How. Pr. (N. Y.) 127; *Whitten v. State*, 47 Ga. 297. It is proper, however, to give the jury

§ 959. **Disinterested witness.**—Other things being equal, a disinterested witness is usually entitled to more credit than an interested witness, but, while such is the case, the court should refrain from giving an instruction to that effect, and should let the jury discover unassisted the propriety of applying such a doctrine,<sup>27</sup> or should at least do no more than state that they may consider such interest or lack of interest in determining who is most worthy of credit, and whom they will or will not believe.<sup>28</sup>

§ 960. **Where witness is an employé of party.**—A witness who is in the employ of one of the parties as a servant should not necessarily

general instructions embodying rules for determining the credibility of witnesses. *Poertner v. Poertner*, 66 Wis. 644; *O'Neil v. State*, 48 Ga. 66; *McLean v. Clark*, 47 Ga. 24; *Lake Erie, &c. R. Co. v. Ind.* 91, 95; *Little v. McGuire*, 43 Iowa, 450; *Wolf v. Willits*, 35 Ill. 95; *Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534; *Robertson v. Monroe*, 7 Ind. App. 470, 33 N. E. 1002; *Stanley v. Montgomery*, 2 Ind. 102; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697; *Newberry v. State*, 26 Fla. 334, 8 So. 445.

While the court may instruct as to the general rules, it cannot invade the province of the jury and direct attention to the credibility of a particular witness. *Grimes v. State*, 63 Ala. 166; *Childs v. State*, 76 Ala. 95; *Rice v. State*, 3 Tex. App. 451; *Nelson v. Warren*, 93 Ala. 108, 8 So. 413; *Weston v. Brown*, 30 Neb. 609, 46 N. W. 826; *Henderson v. Miller*, 36 Ill. App. 232; *Johnson v. People*, 140 Ill. 350, 29 N. E. 895; *Purdy v. People*, 140 Ill. 46, 29 N. E. 700; *Commonwealth v. Barry*, 9 Allen (Mass.) 276; *McMinn v. Whelan*, 27 Cal. 300; *Mullins v. People*, 110 Ill. 42.

In *Travers v. Snyder*, 38 Ill. App. 379, the judgment was reversed because the trial court gave an in-

struction indicating that the jury might rightfully disregard the testimony of a witness.

<sup>27</sup> *Chicago, &c. R. Co. v. Triplett*, 38 Ill. 482; *Sullivan v. Collins*, 18 Iowa, 228. Where this instruction was given on the trial of the case, "Testimony of witnesses who have no interest in the result of the suit, of equal credibility otherwise, is entitled to more weight than the testimony of interested witnesses," the Supreme Court held that while such an instruction was not strictly erroneous, it should have been withheld. *Bonnell v. Smith*, 53 Iowa, 281. Where the trial court embodied the following statement in an instruction, "One interested will not, usually, be as honest and candid as one not so," the Supreme Court held it to be reversible error. *Greer v. State*, 53 Ind. 420.

Many matters which may be fairly commented upon in the argument to the jury would, nevertheless, be out of place in the instructions of the court. *Louisville, &c. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863.

<sup>28</sup> *Veatch v. State*, 56 Ind. 584, 26 Am. R. 44; *Bird v. State*, 107 Ind. 154; *Commonwealth v. Pease*, 137 Mass. 576; *Ballard v. State*, 31 Fla. 266, 12 So. 865.

be discredited on that account.<sup>29</sup> But the relationships may be considered by the jury in determining the weight to be given to his testimony.<sup>30</sup>

§ 961. **Where witness is an accomplice of defendant.**—The accomplice of a defendant on trial in a criminal case is not on that account necessarily unworthy of belief, and the defendant may, in many jurisdictions, be convicted on such testimony alone.<sup>31</sup> How-

<sup>29</sup> *Marquette, &c. R. Co. v. Kirkwood*, 45 Mich. 51; *Wastl v. Montana, &c. R. Co.* 17 Mont. 213, 42 Pac. 772; *Illinois, &c. R. Co. v. Haskins*, 115 Ill. 300, 2 N. E. R. 654, where the court in discussing the subject of such a witness' credibility, said: "It does not, in our judgment, stigmatize the witnesses because they were employes of the company. It was certainly proper for the jury to consider the fact that the relation of employer and employe existed between the company and the witness, to see if the witness, from his manner of testifying, was apparently influenced by it. If he was not, then such relation should be disregarded; and if he was, then the jury would have the right to determine to what extent that relation had influenced his testimony." See, also, *Donley v. Daugherty*, 174 Ill. 582, 51 N. E. 714; *Cicero, &c. St. R. Co. v. Rollins*, 195 Ill. 219, 63 N. E. 101.

In *Bond v. Frost*, 8 La. Ann. 297, the court adhered to the doctrine that the testimony of a witness who was the servant of a common carrier in a suit against the carrier, should be received with allowance.

<sup>30</sup> See *Missouri, &c. R. Co. v. Smith* (Tex. Civ. App.), 72 S. W. 418; *Hankinson v. Lynn, &c. Co.* 175 Mass. 271, 56 N. E. 604; *Fidelity Mut. L. Ins. Co. v. Jeffords*, 107

Fed. 402; *Guckavan v. Lehigh, &c. Co.* 203 Pa. St. 521, 53 Atl. 351.

<sup>31</sup> *Ulmer v. State*, 14 Ind. 52; *Commonwealth v. Grant, Thach. Cr. Cas. (Mass.)* 438; *Coats v. People*, 4 Park. Cr. R. (N. Y.) 662; *Allen v. State*, 10 Ohio St. 287; *People v. Gibson*, 53 Cal. 601; *State v. Litchfield*, 58 Me. 267; *State v. Potter*, 42 Vt. 495; *Reg. v. Dawber*, 3 Stark. 34; *Reg. v. Durham, Leach C. C.* 538; *Stocking v. State*, 7 Ind. 326; *George v. State*, 39 Miss. 570; *Wixson v. People*, 5 Park. Cr. R. (N. Y.) 119; *State v. Brown*, 3 Strobb. (S. Car.) 508; *State v. Russell*, 33 La. Ann. 135; *White v. State*, 52 Miss. 216; *State v. Betsall*, 11 W. Va. 703; *English v. State*, 35 Ala. 428. See, also, post § 1000.

"But there is no rule of law which prevents a conviction on the testimony of an accomplice alone. The utmost caution should undoubtedly be exercised; but juries are, nevertheless, at liberty to convict on the unsupported testimony of a confederate in the crime." *The People v. Dyle*, 21 N. Y. 578.

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has been sometimes said that they ought not to believe him unless his testimony is corroborated by other evidence, and, without doubt,

ever, in view of the fact that the witness is under such an inducement to color his statements and to even go so far as to give false testimony, it should always be received with great caution and the closest scrutiny should be given it.<sup>32</sup> In these cases the question of the credibility of the witness must go to the jury, but the court should instruct as to the circumstances surrounding the testimony of the witness,<sup>33</sup> taking care, however, not to invade the province of the jury.

§ 962. **Where witness is a spy or informer.**—A spy or an informer is not to be discredited simply because he is such.<sup>34</sup> But the fact

great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement." 1 Greenleaf Ev. § 380.

The rule that the testimony of an accomplice may, even when unsupported and uncorroborated, sustain a conviction,—applied on the question of the weight of evidence presented by affidavits for an order of arrest in a civil action. *Royal Ins. Co. v. Noble*, 5 Abb. Pr. N. S. (N. Y.) 54.

While a defendant may be convicted of a misdemeanor on the uncorroborated testimony of an accomplice, such testimony ought not to warrant a conviction for felony. *United States v. Harries*, 2 Bond (U. S.) 311. See *United States v. Smith*, 2 Bond (U. S.) 323; *Parsons v. State*, 43 Ga. 197; *State v. Freedman* (Del.) 53 Atl. 356.

In the state of Texas a statute prohibits conviction upon the uncorroborated testimony of an accomplice. *Lopey v. State*, 34 Tex. 133. So in California, *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359.

The purchaser of liquor sold in violation of law is not the accom-

plice of the seller, and the latter may be convicted on the uncorroborated evidence of the purchaser. *People v. Smith*, 92 N. Y. 665.

<sup>32</sup> *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Fitzcox v. State*, 52 Miss. 923; *Irvin v. State*, 1 Tex. App. 301; *People v. Haynes*, 55 Barb. (N. Y.) 450; *White v. State*, 52 Miss. 216; *State v. Jones*, 64 Mo. 391; *State v. Potter*, 42 Vt. 495. See, also, *State v. Greenburg*, 59 Kans. 404, 53 Pac. 61; *State v. Miller*, 97 N. Car. 484, 2 S. E. 363; *People v. Shaver*, 107 Mich. 562, 65 N. W. 538.

<sup>33</sup> *State v. Hing*, 16 Nev. 307; *State v. Litchfield*, 58 Me. 267; *Sinclair v. Jackson*, 47 Me. 102.

Such instructions cannot be given in the state of West Virginia. *State v. Betsall*, 11 W. Va. 703.

The testimony of an accomplice is not necessarily to be disbelieved from the mere fact that he is an accomplice; but it is said that the courts usually instruct a jury that his testimony is not to be regarded, unless it is confirmed, in some part of it at least, by unimpeachable evidence. *United States v. Kessler*, 1 Baldw. (U. S.) 22. See *Ray v. State*, 1 Greene (Iowa) 316.

<sup>34</sup> *St. Charles Tp. v. O'Mailey*, 18 Ill. 407; *People v. Barrie*, 49 Cal.

that he is a spy or informer may, with other facts, be considered by the jury in determining the weight to be assigned to his testimony.

**§ 963. Where witness is a party—In civil cases.**—Where the witness who is testifying is a party to the suit his credibility is left entirely to the jury, who may, if they think proper, find in accordance with his evidence or directly against it according to some of the authorities, even though it be uncontradicted and unimpeached.<sup>35</sup> The testimony of a party is not regarded, ordinarily, as an admission of facts, but it goes to the jury on the same footing as any other testimony.<sup>36</sup> They may, however, consider the interest which the witness has in the result of litigation.<sup>37</sup>

**§ 964. Where witness is a party—In criminal cases.**—When a defendant in a criminal case becomes a witness in his own behalf, the testimony is received on the same terms as that of other witnesses, and the jury are the sole judges of his credibility. They should, however, be very careful in considering the testimony of such a wit-

342; *Campbell v. Commonwealth*, 84 Pa. St. 187; *Wright v. State*, 7 Tex. App. 574; *State v. Bennett*, 40 S. Car. 308, 18 S. E. 886.

A private detective is not an accomplice. *De Long v. Giles*, 11 Ill. App. 33. Neither is a "spotter." *State v. Hoxsie*, 15 R. I. 1.

In *Commonwealth v. Downing*, 4 Gray (Mass.) 29, it was held that while one who purchases intoxicating liquor sold contrary to law, for the express purpose of instituting a prosecution against the seller for an unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller, still the jury should be instructed to receive his evidence with the greatest caution and distrust. The same principle was applied to a person who was secretly employed to watch and detect a husband or wife suspected of adulterous conduct. *Anonymous* 17 Abb. Pr. (N. Y.) 48. See, also, *Hronek v. People*, 134 Ill. 139, 24

N. E. 861, 23 Am. St. 652, 8 L. R. A. 837; *Kestner v. State*, 58 Neb. 767, 79 N. W. 713; *People v. Rice*, 103 Mich. 350, 61 N. W. 540.

<sup>35</sup> *Laramore v. Minish*, 43 Ga. 282; *Nicholson v. Conner*, 8 Daly (N. Y.) 212; *Klason v. Rieger*, 22 Minn. 59; *Bridgen v. Walker*, 40 Tex. 135.

No presumption is to be made against a party because he does not testify in his own behalf. *Lowe v. Massey*, 62 Ill. 88.

The adverse party may ask the court to instruct the jury to consider in determining the weight of the testimony of a witness that he is a party to the suit. *Hill v. Sprinkle*, 76 N. Car. 353.

<sup>36</sup> *Matthews v. Story*, 54 Ind. 417.

<sup>37</sup> *White v. Ross*, 35 Fla. 377, 17 So. 640; *State v. Carey*, 23 Ind. App. 378, 55 N. E. 261; *West Chicago, &c. R. Co. v. Dougherty*, 170 Ill. 379, 48 N. E. 1000; *Curtice v. Crawford Co. Bank*, 110 Fed. 830; *State v. Olds*, 18 Ore. 440, 22 Pac. 940.

ness, and should take into consideration every possible relation that the witness has to the suit, which may in any way have a tendency to affect his testimony.<sup>38</sup> But here, too, the court should be careful not to invade the province of the jury in its instructions, and it has been held that however incredible his story may seem he is entitled to have an instruction upon the hypothesis that it is true.<sup>39</sup>

**§ 965. Question of credibility is for jury.**—The credibility of a

<sup>38</sup> *State v. Sanders*, 76 Mo. 35; *State v. McGinnis*, 76 Mo. 326; *Chambers v. People*, 105 Ill. 409; *State v. Pfefferle*, 36 Kans. 90; *State v. Cooper*, 71 Mo. 436; *McCormack v. State*, 133 Ala. 202, 32 So. 268; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354; *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182.

In one case where a defendant on trial for homicide was the only person who witnessed the killing, testified to facts which amounted to a justification of the killing, and he being the only witness who testified on that point, yet it was held that it was for the jury to determine how much of and how far they would believe the witness' statement. *People v. Strange*, 61 Cal. 496.

An instruction in a criminal trial, that the fact that the defendant testifies in his own behalf may be considered by the jury in determining the credibility of his testimony, is correct. *State v. Maguire*, 69 Mo. 197.

The fact that a witness is a defendant may be shown in order to affect his credibility, and the court has a right to so instruct the jury. *State v. Zorn*, 71 Mo. 415.

<sup>39</sup> *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; 2 West Coast R. 878. This can hardly be true where the witness testifies to what as matter

of common knowledge every one knows to be physically and absolutely impossible. *Hunter v. New York, &c. Co.* 110 N. Y. 624. See, generally, *Cleveland, &c. R. Co. v. Wynant*, 114 Ind. 525; *Racer v. State*, 131 Ind. 393; *Gilbert v. Flint*, 51 Mich. 488.

The judge should, as a general rule, abstain from commenting upon the weight of the defendant's testimony. *State v. Stewart*, 9 Nev. 120.

See, as to how far the court may go in its comments upon a defendant's testimony. *State v. Maguire*, 69 Mo. 197; *State v. Zorn*, 71 Mo. 415; *People v. Cronin*, 34 Cal. 191; *St. Louis v. State*, 8 Neb. 405; *State v. Swain*, 68 Mo. 605, 608; *Commonwealth v. Wright*, 107 Mass. 403.

If there is no request for an instruction as to the credibility of a witness who is the defendant in the suit, the court need not of its own motion give such an instruction. *People v. Rodunds*, 44 Cal. 538.

Where two defendants were jointly indicted and jointly tried, and each testified as a witness in his own behalf, and the testimony of one was inconsistent with and contradictory to that of the other, the court committed no error in telling the jury that they could not believe the testimony of both witnesses. *State v. McLane*, 15 Nev. 345.

witness is exclusively for the jury.<sup>40</sup> It is reversible error, at least in most jurisdictions, for the court to attempt to invade the province of the jury by instructing as to what witnesses are entitled to credit and what are not.<sup>41</sup> The jury, however, must have some substantial basis on which to base their estimation of the credibility of the witness, and they cannot, through mere caprice, arbitrarily decide him

<sup>40</sup> *Spies v. People*, 122 Ill. 1, 3 Am. St. 320; *State v. Hoxsie*, 15 R. I. 1. *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191; *National Bank v. Mills*, 99 N. Y. 656; *Moore v. Jones*, 13 Ala. 296; *Bowers v. People*, 74 Ill. 418; *Terry v. State*, 13 Ind. 70; *Mechelke v. Bramer*, 59 Wis. 57; *Union, &c. R. Co. v. Kallaher*, 114 Ill. 325; *Moore v. State*, 68 Ala. 360; *Western, &c. R. Co. v. Carlton*, 28 Ga. 180; *Stampofski v. Steffens*, 79 Ill. 303; *Harrison v. Brock*, 1 Munf. (Va.) 22; *Whitten v. State*, 47 Ga. 297; *Kinchelow v. State*, 5 Humph. (Tenn.) 9; *Holloway v. Commonwealth*, 11 Bush (Ky.) 344; *Wallace v. State*, 28 Ark. 531; *Paton v. Steward*, 78 Ill. 481; *Shellabarger v. Nafus*, 15 Kans. 547; *Mack v. State*, 48 Wis. 271; *Mechelke v. Bramer*, 59 Wis. 57; *Finerty v. Fritz*, 6 Colo. 137; *Ratteree v. State*, 78 Ga. 335; *Gibson v. State*, 89 Ala. 121.

"The jury passed upon the credibility of the witnesses, and their conclusions in that regard will not be reviewed." *Stocking v. State*, 7 Ind. 326.

Matters affecting the credibility of witnesses are to be judged of by the jury as they would judge of them in everyday life. *United States v. Hughes*, 34 Fed. 732.

"It is the province of the jury to determine the credibility of witnesses, and the weight that should be attached to their testimony. The

weight that should be attached to the testimony of a witness, depends upon his honesty of purpose, his capacity to understand the subject matter, and his means of knowing the facts about which he is testifying, as well as his disinterestedness and freedom from bias and prejudice. Wherever the witness is lacking in any of these respects, it would, in a greater or less degree, weaken the force of his testimony. These are matters which a jury may well take into consideration, and give to the testimony of a witness such weight and credibility as they may think it entitled to under all the circumstances, and no more." *McLees v. Felt*, 11 Ind. 218.

"*Chambers v. People*, 105 Ill. 409; *De Long v. Giles*, 11 Ill. App. 33; *Roberts v. State* (Wis.), 54 N. W. 580; *Sharp v. State*, 51 Ark. 147. *Crutchfield v. Richmond, &c. R. Co.* 76 N. Car. 320; *Greer v. State*, 53 Ind. 420; *Veatch v. State*, 56 Ind. 584; *Clevenger v. Curry*, 81 Ill. 432; *Ex parte Warrick*, 73 Ala. 57; *Moore v. State*, 68 Ala. 360; *People v. Wallin*, 55 Mich. 497, 22 N. W. 15; *Lawrence v. Maxwell*, 58 Barb. (N. Y.) 511; *Delvee v. Boardman*, 20 Iowa, 446; *Roach v. People*, 77 Ill. 25; *Paris v. Strong*, 51 Ind. 339; *Hartford, &c. Co. v. Gray*, 80 Ill. 28. See *Leibig v. Steiner*, 94 Pa. St. 466; *Gibson v. Troutman*, 9 Ill. App. 94; *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.



unworthy of credit,<sup>42</sup> although there seems to be some conflict on this subject. Expert witnesses generally stand on the same footing as to credibility as non-expert witnesses,<sup>43</sup> that is, it is for the jury to determine their credibility and the weight of their testimony when admitted.

§ 966. **Weight or value of testimony—Question for jury.**—The question of the weight or value to be ascribed to the testimony of a witness is one for the jury, and, as a rule, the court cannot assume to decide it. The court may, however, state to the jury the general rules for determining the value of testimony. Broad as the province of the jury is in this respect, it cannot arbitrarily disregard testimony nor can jurors act upon knowledge of the facts not acquired upon the

In *Kinner v. State*, 45 Ind. 175, where the court said in the presence of counsel and the jury, "I have serious doubts whether that witness ought not to be recognized to answer for perjury," it was held to be error.

In a criminal case, where the defendant, though not the only witness testifying in his own behalf, was the only one interested, the court, on appeal, held that an instruction of the trial court, that the jury might consider the interest of any witness, in connection with all the evidence, in determining how far they would believe him, was erroneous, as tending to single out and mark the defendant as incredible. *Townsend v. State* (Miss.), 12 So. 209. See *Buckley's Case*, 62 Miss. 705; *Woods v. State*, 67 Miss. 575.

<sup>42</sup> *Wallace v. State*, 28 Ark. 531; *Holloway v. Commonwealth*, 11 Bush (Ky.) 344; *Jones v. State*, 48 Ga. 163; *Smith v. Grimes*, 43 Iowa, 357; *Chester v. State*, 1 Tex. App. 702; *Paton v. Steward*, 78 Ill. 481; *Shellabarger v. Nafus*, 15 Kans. 547; *Bank of Macon v. Kent*, 57 Ga. 283; *Evans v. George*, 80 Ill. 51; *Green v. Cochran*,

43 Iowa, 545; *State v. Smallwood*, 75 N. Car. 104; *Oliver v. Pate*, 43 Ind. 132; *Lomer v. Meeker*, 25 N. Y. 361.

They may, in making up their estimate, consider the fact that the witness is contradicted by other witnesses. *Rider v. People*, 110 Ill. 11.

<sup>43</sup> *Eggers v. Eggers*, 57 Ind. 461. In this case the court, in speaking of the testimony of expert witnesses, said: "The value of such testimony depends as much upon all the facts and circumstances connected with each particular case as that of any other class of witnesses. It is for the court first to decide whether a witness is competent to testify as an expert; but, when permitted to testify, an expert stands substantially on the same footing as any other witness as to credibility. His testimony may be of value, or it may not be, depending upon the manner in which it may be able to withstand the usual tests of credibility which may be applied to it." See, also, *Davis v. The State*, 35 Ind. 496; *Guetig v. State*, 66 Ind. 94; *Goodwin v. State*, 96 Ind. 550, 561.

trial of the cause from the evidence.<sup>44</sup> Ordinarily, the presumption is in favor of the credibility of the witness.<sup>45</sup> If the court instructs the jury to disregard the testimony as false, it must, under the penalty of having its instruction declared erroneous, inform the jury that the false testimony of the witness must be knowingly and wilfully given.<sup>46</sup> A jury may believe some of the statements of a witness and disregard others.

<sup>44</sup> *Collins v. State*, 94 Ga. 394, 19 S. E. 243; *Purdy v. People*, 140 Ill. 46, 29 N. E. 700; *Riley v. State*, 75 Miss. 352, 22 So. 890. In a Texas case the jury asked the court this question: "Can we judge a witness just by what he says on the stand, and not by what we know of him privately?" The court failed to answer the question, and on appeal the case was reversed on the ground that such failure to answer was error because it left the jury wholly at liberty to make up their verdict absolutely regardless of the evidence adduced in the trial of the cause. *Wharton v. State*, 45 Tex. 2. See *Kehr v. Stauff*, 12 Daly (N. Y.) 115.

<sup>45</sup> *Comstock v. Rayford*, 20 Miss. 369; *Hauss v. Lake Erie R. Co.* 105 Fed. 733; *State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *Crane v. State*, 111 Ala. 45, 20 So. 590.

The jury should not, however, as a rule, be instructed to indulge in such presumption. *State v. Jones*, 77 N. Car. 520.

If the witness' statements are highly improbable, the jury may disregard them, even though they be uncontradicted and unimpeached by other evidence. *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238; *Elwood v. Western, &c. Co.* 45 N. Y. 549. In the latter case the court used this language: "There may be such a degree of improbability in the statements themselves as to

deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That disqualification must, in the present state of the law, be added. And, furthermore, it is a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and blindly to adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached."

<sup>46</sup> *Blitt v. Heinrich*, 33 Mo. App. 243; *State v. Buechler*, 103 Mo. 203, 15 S. W. 331; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Gottlieb v. Hartman*, 3 Colo. 53; *Pope v. Dodson*, 58 Ill. 360; *Quinn v. Rawson*, 5 Ill. App. 130; *Callanan v. Shaw*, 24 Iowa, 441; *People v. Strong*, 30 Cal. 151; *U. S. Express Co. v. Hutchins*, 58 Ill. 44; *Chicago, &c. R. Co. v. Boger*, 1 Ill. App. 472; *Swan v. People*, 98 Ill. 610; *Murtaugh v. Murphy*, 30 Ill. App. 59; *Vicksburg, &c. R. Co. v. Hedrick*, 62 Miss. 28;

§ 967. **Comparative weight of testimony in open court and by deposition.**—It is intimated in some of the cases that the testimony of a witness given in open court is of more weight than that of a witness whose testimony is given in the form of a deposition.<sup>47</sup> But, as shown in the note, this is not necessarily true; the jury should not be so instructed as a matter of law.

§ 968. **Weight of testimony—Number of witnesses.**—Some of the courts have held that where the contradicting witnesses are entitled to equal credit, and all other things are equal, the side on which there is the greater number of witnesses will prevail.<sup>48</sup> Where the parties on the opposite sides of the suit give contradictory tes-

Smith v. Wabash, &c. R. Co. 19 Mo. App. 120; Freeman v. Easley, 117 Ill. 317. Compare Frierson v. Galbraith, 12 Lea (Tenn.) 129.

The following instruction, "that a witness false in one part of his testimony is to be distrusted in other parts" is not erroneous, even if the word "wilful" is omitted. People v. Treadwell, 69 Cal. 226.

It is held, and with reason, that a court cannot be required to embody in a charge the maxim "falsus in uno falsus in omnibus." State v. Banks, 5 S. & R. (Pa.) 18.

Where a witness laboring under a mistake unintentionally gives false testimony, the jury are not on that account to disregard and reject all of his testimony. State v. Elkins, 63 Mo. 159; Koehucke v. Ross, 16 Abb. Pr. (N. Y.) 345; Shenuit v. Breuggestratt, 8 Mo. App. 46; State v. Lett, 85 Mo. 52.

The court should not instruct that they should entirely disregard the testimony, but that they may do so. Clapp v. Bullard, 23 Ill. App. 609.

People v. Hicks, 53 Cal. 354; Goering v. Outhouse, 95 Ill. 346; Lewis v. Hodgdon, 17 Me. 267; Parsons v. Huff, 41 Me. 410; State v. Wil-

liams, 2 Jones (N. Car.) 257; Finley v. Hunt, 56 Miss. 221; People v. Sprague, 53 Cal. 491; Schuck v. Hagar, 24 Minn. 339; Blanchard v. Pratt, 37 Ill. 243; Merrill v. Whitefield, 41 Me. 414; Mead v. McGraw, 19 Ohio St. 55; Pennsylvania Co. v. Conlan, 101 Ill. 93; Oliver v. Cameron, 4 McArt. (D. C.) 237; Smith v. Forbes, 14 Ill. App. 477; White v. Disher, 67 Cal. 402.

<sup>47</sup> Mathilde v. Levy, 24 La. Ann. 24. In the case of Carver v. Louthain, 38 Ind. 530, it was decided that the testimony of a witness embodied in a deposition should be regarded as of less weight than the oral testimony of a witness in court, but the case was overruled. Millner v. Eglin, 64 Ind. 197, 31 Am. R. 121; Voss v. Bier, 71 Ind. 134; Greer v. State, 53 Ind. 420; Veatch v. State, 56 Ind. 584.

<sup>48</sup> Vaughan v. Parr, 20 Ark. 600; Townsend, &c. Co. v. Foster, 57 Barb. (N. Y.) 346; Dowdell v. Neal, 10 Ga. 148; The Napoleon, 17 Fed. Cas. 1157. For a carefully guarded instruction embodying this idea see Indianapolis St. R. Co. v. Schmidt (Ind.), 71 N. E. 201, 204.

"It not infrequently happens that the preponderance of evidence is

timony, the jury must determine the relative credibility.<sup>49</sup> Courts do not, as a rule, weigh testimony according to the number of witnesses on a given side, and there are a great many cases holding that the testimony of a single witness may be sufficient to determine the issue of the suit.<sup>50</sup>

§ 969. **Positive and negative testimony.**—Positive testimony, even if from a single witness, sometimes is entitled to greater weight than negative testimony, even though many witnesses testify to the negative.<sup>51</sup> But much depends on the circumstances, and the court

in favor of the side supported by the fewer witnesses." *McLees v. Felt*, 11 Ind. 218.

It has been held that when there is an irreconcilable conflict of testimony as to the terms of a contract, and the witnesses are equally credible, the supposition is that they testified to different transactions, and in that event the last must prevail. *Hobbs v. Davis*, 30 Ga. 423.

It has also been held that the verbal testimony of fifteen witnesses, after forty-eight years, that a soldier survived the war, is not equal to the testimony of one, corroborated by documentary evidence, that he fell in the war. *Jackson v. Loomis*, 12 Wend. (N. Y.) 27.

<sup>49</sup> *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238; *Haines v. People*, 82 Ill. 430; *Stampofski v. Steffens*, 79 Ill. 303; *Moody v. Pell*, 2 Abb. N. Cas. (N. Y.) 274. See, also, *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071, and authorities cited.

But it has been held that where the defendant swears exactly opposite to the testimony of the plaintiff and there are no other witnesses or testimony, the case stands as if no evidence had been given, and the plaintiff does not recover. *Ander-son v. Collins*, 6 Ala. 783.

Slight documentary evidence, however, will turn the scale toward the side on which it is given. *Strumbaugh v. Hallam*, 48 Ill. 305.

<sup>50</sup> *Leibig v. Steiner*, 94 Pa. St. 466; *Riley v. Butler*, 36 Ind. 51; *Enders v. Williams*, 1 Metc. (Ky.) 346; *Proctor v. Terrill*, 8 B. Mon. (Ky.) 451; *Ford v. Haskell*, 32 Conn. 489; *Derby v. Derby*, 21 N. J. Eq. 36; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492. See, also, *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071, and authorities cited.

"Courts do not, and ought not to, as a rule, weigh evidence by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may, and often ought to, have more weight in the decision of the cause than the testimony of a dozen adverse witnesses. The court below must judge of the credibility of the different witnesses, and weigh and reconcile their clashing evidence; and, if their evidence cannot be harmonized, the court below, or jury trying the cause, must determine which of the witnesses are the more worthy of belief." *Rudolph v. Lane*, 57 Ind. 117.

<sup>51</sup> *Kennedy v. Kennedy*, 2 Ala. 571; *Johnson v. State*, 14 Ga. 55; *Pool v. Devers*, 30 Ala. 672; *Hep-*

should not, ordinarily, instruct the jury that positive testimony is entitled to greater weight than negative, without qualification, at

burn v. Citizens Bank, 2 La. Ann. 1007; Delk v. State, 3 Head (Tenn.) 79; Todd v. Hardie, 5 Ala. 698; Coles v. Perry, 7 Tex. 109; Harris v. Bell, 27 Ala. 520; Auld v. Walton, 12 La. Ann. 129; Jackson v. Loomis, 12 Wend. (N. Y.) 27; Ralph v. Chicago, &c. R. Co. 32 Wis. 177; Matthews v. Poythress, 4 Ga. 287; Stilt v. Hindekopers, 17 Wall. (U. S.) 384; Berg v. Chicago, &c. R. Co. 50 Wis. 419; Railroad Co. v. Lane, 33 Kans. 702; Missouri, &c. Co. v. Pierce (Kans.), 18 Pac. 305. Many cases affirm that positive is always stronger than negative. Sowla v. Chess. Carly Co. 39 La. Ann. 344; Southern Kansas, &c. R. Co. v. Hinsdale, 38 Kans. 507; Georgia, &c. R. Co. v. Freeman, 83 Ga. 583; State v. Chevallier, 36 La. Ann. 81; Hinton v. Cream City, &c. Co. 65 Wis. 323, 327; Frizell v. Cole, 42 Ill. 363.

The distinction should be kept in mind between negative and contradictory testimony, for where one witness testifies positively to a fact, and another witness of equal credibility contradicts it, the jury are not to be instructed as matter of law that the fact is not proved. See Johnson v. Whidden, 32 Me. 230.

Where one witness swears that two men on horseback met, passed each other, and both wheeling, had an angry conversation; and another witness swears that he saw the two men meet and pass each other, and that they did not wheel nor converse together; and the judge charges that where one witness swears affirmatively and another negatively, the affirmative must

prevail, such charge is inapplicable and erroneous. State v. Gates, 20 Mo. 400.

The testimony of a witness, having a full opportunity of knowing that a person did not strike a blow, is affirmative evidence, and entitled to weight as such. Coughlin v. People, 18 Ill. 266.

Where A swore that B, C, and D had an important conversation together, and D swore that no such conversation took place, held, that the rule giving preference to affirmative over negative testimony did not apply, for, there being a direct contradiction, the jury must be guided by other tests in ascertaining the truth. Reeves v. Poin-dexter, 8 Jones (N. Car.) 308.

Counsel frequently very lucidly and satisfactorily explain to juries the meaning and weight of negative testimony by using the illustration of a striking clock. Nearly every trial court room has a clock which by calling the attention of the jury to the fact that if one of their number should swear positively to the fact that the clock struck ten, that he heard it and counted the strokes, while the other eleven would swear that they did not hear it strike, but that it might have struck, they easily see that the greater weight is to be given to the one man's testimony.

In Johnson v. Scribner, 6 Conn. 185, three witnesses swore positively that they heard certain words spoken in a ball-room where there was noise and confusion from the music and the dancing. Eleven others present at the same time and

least.<sup>52</sup> Occasionally there are cases where the testimony, though negative in form, is held to be affirmative, as where a person testified that he was very near a railway crossing and was in a very favorable position to have heard the locomotive bell or whistle had it been rung or blown, but that he did not hear it.<sup>53</sup>

place swore that they did not hear the words and that they believed that if they had been spoken, they would have heard them. The jury found against the testimony of the three witnesses and the court at once granted a new trial on the ground that the affirmative statements were of much greater weight than the negative statements.

Where one party swore that a lease contained a certain statement and another swore that it did not the rule of positive and negative testimony has no application. *Sobey v. Thomas*, 39 Wis. 317. See, generally, *Culkane v. Railroad Co.* 60 N. Y. 133; *Jackson v. Loomis*, 12 Wend. (N. Y.) 27; *Johnson v. Whidden*, 32 Me. 230.

<sup>52</sup> It is very doubtful whether the doctrine respecting the comparative value of positive and negative testimony is one of law in such a sense as to make it proper for the court to embody it in an instruction. It seems to the writer that there are comparatively few cases where the doctrine can be stated in an instruction as a rule of law. *State v. Gates*, 20 Mo. 400; *Coughlin v. People*, 18 Ill. 266; *Wood Co. Ct. v. Bennet*, 1 Cow. (N. Y.) 711;

*Reeves v. Poindexter*, 8 Jones (N. Car.) 308; *Rockford, &c. R. Co. v. Hillmer*, 72 Ill. 285; *Chadwick v. Chadwick*, 52 Mich. 545; *Ohio, &c. R. Co. v. Buck*, 130 Ind. 300, 30 N. E. 19.

<sup>53</sup> *Rockford, &c. R. Co. v. Hillmer*, 72 Ill. 235. Compare *Bemis v. Becker*, 1 Kans. 226; *Coughlin v. People*, 18 Ill. 266; *State v. Johnson*, 30 N. J. L. 452.

The negative testimony of witnesses familiar with a certain commodity, who have long dealt in it, that they never saw any of a specified brand, may be weighed against testimony of another witness that he had seen it, in determining whether such brand existed, and was known in the market. *Pollen v. Leroy*, 10 Bosw. (N. Y.) 38.

While positive testimony often outweighs negative, it is not true as a matter of law that negative evidence may not be sufficient in fact to counterbalance the positive testimony of a single witness. *Campbell v. New England, &c. Ins. Co.* 98 Mass. 381. See, also, *Murray v. Missouri Pac. R. Co.* 101 Mo. 230; *Kelley v. Schupp*, 60 Wis. 80. See *Ralph v. Chicago, &c. R. Co.* 32 Wis. 177.

## CHAPTER XLV.

### IMPEACHMENT.

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|------|--|------|--|
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§ 970. **Meaning of term.**—Impeachment of a witness is defined as an allegation, supported by proof, that a witness who has been examined is unworthy of credit.<sup>1</sup> By impeachment of a witness is

<sup>1</sup> 1 Bouvier Law Dict. (Rawle's Ed.) 989.

generally meant a charge or accusation, supported by evidence or proof, that a witness who has testified in a cause is unworthy of credit.<sup>2</sup> It is said, however, that "the word impeach is capable of two significations; one is the charge or accusation of want of veracity, the other is the establishment of the charge."<sup>3</sup> In strictness, a witness is not necessarily impeached merely because there is conflicting or contradictory evidence of another witness as to the same matter,<sup>4</sup> although in a few jurisdictions it is held—generally because of some statutory provision—that a witness may be impeached by contradictory evidence, and a party may call witnesses to contradict material and relevant evidence given by a witness for his adversary, either directly or by proof of facts and circumstances inconsistent therewith, so that in this sense the witness may be discredited or impeached.<sup>5</sup>

§ 971. **Contradicting and impeaching**—In general.—For the purpose of lessening or destroying the credibility of a witness, the party against whom he has testified has, within certain limits, the right to contradict and impeach him. Questions as to matters which tend to impair or destroy the credibility of the witness by showing malice, bias, ill feeling or the like, are generally relevant and proper, and the extent to which they may be asked lies much within the sound discretion of the court.<sup>6</sup> The witness may also be impeached by proving inconsistent and extraordinary statements made out of court, and by proving his general bad character or reputation for

<sup>2</sup> On the general subject of impeachment see articles 16 Cent. Law Jour. 325, 37 Alb. Law Jour. 9, 30 Cent. Law. Jour. 241, 24 *ibid*, 226, 38 *ibid*, 146, 22 Am. Law Rev. 455, 20 Weekly Law Bul. 1, and notes 15 Am. Dec. 99, 73 Am. Dec. 762, 21 L. R. A. 418-433, 82 Am. St. 25-68.

<sup>3</sup> *White v. McLean*, 47 How. Pr. (N. Y.) 193.

<sup>4</sup> *Baker v. Robinson*, 49 Ill. 299; *Louisville, &c. R. Co. v. Kelly*, 63 Fed. 407.

<sup>5</sup> *People v. De France*, 104 Mich. 563, 62 N. W. 709; *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179, 184; *People v. Freeman*, 92 Cal. 359;

*Little v. Lichkoff*, 98 Ala. 321; *Riddell v. Thayer* 127 Mass. 489; *Grimes v. Hill*, 15 Colo. 359, 365, 25 Pac. 698; *Pharo v. Beadleston*, 21 N. Y. S. 989.

<sup>6</sup> *Gutterson v. Morse*, 58 N. H. 165; *Rusling v. Bray*, 37 N. J. Eq. 174; *Muller v. St. Louis Hospital Asso.* 73 Mo. 242; *Marx v. Hilsendegen*, 46 Mich. 336; *Player v. Burlington, &c. R. Co.* 62 Iowa, 723; *South Bend v. Hardy*, 98 Ind. 577; *Prescott v. Ward*, 10 Allen (Mass.) 203, 209; *Sturgis v. Robbins*, 62 Me. 289, 293; *Wroe v. State*, 20 Ohio St. 460.

It has been held that one witness cannot be called to impeach the soundness of another witness's



truth and veracity, or, in some jurisdictions, his bad character or reputation generally. So, as already stated, evidence is admissible to contradict the testimony of a witness as to material matters.

§ 972. **Who may be impeached.**—Generally speaking, any witness may be impeached. Thus, a party to a civil action,<sup>7</sup> or a defendant in a criminal prosecution,<sup>8</sup> who becomes a witness, may be impeached. Likewise, an impeaching witness<sup>9</sup> may be impeached. But, where a party to an action becomes a witness, contradictory statements made by him may usually be shown as admissions, and, where this is true, no foundation is required to be laid by first calling his attention to the matter and asking him whether he made such a statement.<sup>10</sup> A few authorities, however, while admitting

memory. *Wiggins v. Holman* 5 Ind. 502; *Goodwyn v. Goodwyn*, 20 Ga. 600. But we think that evidence of facts showing the memory of the witness to be faulty may be given. *Allemann v. Stepp*, 52 Iowa, 626, 35 Am. R. 288, 3 N. W. 636; *Isler v. Dewey*, 75 N. Car. 460; *McDowell v. Preston*, 26 Ga. 528.

"Courts usually allow questions to be put to a witness to affect his credibility; but it is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination-in-chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination shall be allowed." *Storm v. United States*, 94 U. S. 76; *Sturgis v. Robbins*, 62 Me. 289, 293; *Johnson v. Wilson*, 74 Ind. 233, 239; *Scott v. State*, 64 Ind. 400.

<sup>7</sup> *Varona v. Socarras*, 8 Abb. Pr. (N. Y.) 302. See *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154.

<sup>8</sup> *Mershom v. State*, 51 Ind. 14; *State v. Clinton*, 67 Mo. 380; *State v. Efler*, 85 N. Car. 585; *State v.*

*Hardin*, 46 Iowa, 623; *State v. Cox*, 67 Mo. 392; *Jackson v. State*, 33 Tex. Cr. App. 281, 26 S. W. 194, 47 Am. St. 30; *Buchanan v. State*, 109 Ala. 7, 19 So. 410; *State v. Schuepel*, 23 Mont. 523, 59 Pac. 927.

"It is the common law right of a party in a criminal as well as in a civil cause, to attack the character of an opposing witness for truth, and this right has in no manner been abridged by statute. To refuse to allow the character of a defendant, when a witness, to be thus attacked, would afford him an advantage not enjoyed by other witnesses, and clearly not contemplated by any statute of this state." *State v. Beal*, 68 Ind. 345.

<sup>9</sup> *Citizens', &c. Co. v. Short*, 62 Ind. 316; *Starks v. People*, 5 Den. (N. Y.) 106; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *State v. Brant*, 14 Iowa, 180; *State v. Cherry*, 63 N. Car. 493; *State v. Moore*, 25 Iowa, 128, 95 Am. Dec. 776; *Phillips v. Thorn*, 84 Ind. 84, 43 Am. R. 85.

<sup>10</sup> *Owens v. Kansas City, &c. R. Co.* 95 Mo. 169, 8 S. W. 350, 6 Am. St. 39; *Kreiter v. Bomberger*, 82 Pa. St. 59; *Wilson v. Wilson*, 137 Pa. St. 269, 20 Atl. 644; *Rose v. Otis*,

that no foundation is required to be laid if the evidence is an admission and offered as such, require a foundation to be laid if the evidence, although it may be in the nature of an admission, is offered as impeaching evidence.<sup>11</sup>

§ 973. **Showing ill-will, malice, or bias.**—A witness may be impeached by showing that he entertains ill-will or malice toward the party against whom he testifies.<sup>12</sup> It may be shown that there has been a quarrel between the witness and the party against whom

18 Colo. 59, 31 Pac. 493; *Collins v. Mack*, 31 Ark. 684; *Coffin v. Bradbury*, 3 Idaho, 770, 35 Pac. 715. See, also, *Snyder v. State*, 59 Ind. 105; *Woods v. State*, 63 Ind. 353; *Epps v. State*, 102 Ind. 539; *Logansport, &c. Tp. Co. v. Heil*, 118 Ind. 135, 20 N. E. 703; *Sladden v. Sergeant*, 1 F. & F. 322. But the next friend of a minor is held not to be a party within the rule. *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208.

<sup>11</sup> *Conway v. Nicol*, 34 Iowa, 533; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340 (but see *State v. Forsythe*, 99 Iowa, 1, 68 N. W. 446); *Davis v. Franke*, 33 Gratt. (Va.) 413; *Martineau v. May*, 18 Wis. 54. See, also, *Kelsey v. Layne*, 28 Kans. 218; *Varona v. Socorras*, 8 Abb. Pr. (N. Y.) 302.

<sup>12</sup> *Lodge v. State*, 122 Ala. 97, 26 So. 210, 82 Am. St. 23 and note; *Collins v. Stephenson*, 8 Gray (Mass.) 438; *Hutchinson v. Wheeler*, 35 Vt. 330, 340; *Long v. Lamkin*, 9 Cush. (Mass.) 361, 365; *Drew v. Wood*, 26 N. H. 363; *Atwood v. Welton* 7 Conn. 66, 71; *Titus v. Ash*, 24 N. H. 319; *Martin v. Barnes*, 7 Wis. 239; *Pierce v. Gilson*, 9 Vt. 216; *Daggett v. Tallman*, 8 Conn. 168; *Bishop v. State*, 9 Ga. 121; *State v. Jones*, 106 Mo. 302, 17 S. W. 366; *State v. Montgomery*, 28 Mo. 594; *Simpson v. State*, 78 Ga. 91; *Bersch v. State*, 13 Ind. 434;

*Folsom v. Brawn*, 25 N. H. 114; *Edwards v. Sullivan*, 8 Ired. (N. Car.) 302; *Martin v. Farnham*, 25 N. H. 195; *Newton v. Harris*, 6 N. Y. 345; *Starr v. Gragin*, 24 Hun (N. Y.) 178; *Gale v. New York, &c. R. Co.* 76 N. Y. 595; *Langhorne v. Commonwealth*, 76 Va. 1012; *Phoenix v. Castner*, 108 Ill. 207; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *Skinner v. State*, 120 Ind. 127, 22 N. E. 115; *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879.

It has been held that in order to impeach a witness by proof that he made statements showing ill-will or hatred, he must first be given an opportunity to explain his statements. *State v. Dickerson* 98 N. Car. 708; *McKnight v. United States*, 97 Fed. 208; *Davis v. State*, 51 Neb. 301, 70 N. W. 784.

"It is always competent to show that a witness produced upon the trial of an action is hostile in his feeling toward the party against whom he is called to testify or that he entertains malice toward that party." *Schultz v. Third Avenue R. Co.* 89 N. Y. 242, 248.

If the accused on the cross-examination of a witness for the prosecution asks him as to his state of feelings toward him, the accused, and he refuse to answer or gives an evasive answer, such fact may be proved by any other com-

the witness testifies,<sup>13</sup> and, in general, any matter which discloses hatred or ill-will or bias may be shown.<sup>14</sup> But particulars of the quarrel or matter causing the bias or ill feeling cannot ordinarily be gone into, as a matter of right, further than seems reasonably necessary to properly show the ill feeling or prejudice.<sup>15</sup> The fact of hostility or bias may be brought out upon cross-examination or by competent

petent witness. *State v. McFarlain*, 41 La. Ann. 686. See, also, *Hamilton v. Manhattan, &c. R. Co.* 9 N. Y. S. 313.

<sup>13</sup> *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Lucas v. Flinn*, 35 Iowa, 9; *Day v. Stickney*, 14 Allen (Mass.) 255; *Daffin v. State*, 11 Tex. App. 76; *Beardsley v. Wildman*, 41 Conn. 515; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *McHugh v. State*, 31 Ala. 317; *Newcomb v. State*, 37 Miss. 383; *Carr v. Moore*, 41 N. H. 131; *McFarlin v. State*, 41 Tex. 23; *Polk v. State*, 62 Ala. 237.

<sup>14</sup> *Starr v. Cragin*, 24 Hun (N. Y.) 177; *Swett v. Shumway*, 102 Mass. 365; *Batdorff v. Farmers Nat. Bank*, 61 Pa. St. 179; *Sager v. State*, 11 Tex. App. 110; *Rossett v. State*, 16 Ala. 362; *Daggett v. Tallman*, 8 Conn. 168; *Lucas v. Flinn*, 35 Iowa, 9; *Crumpton v. State*, 52 Ark. 273; *State v. Miller*, 71 Mo. 590; *Colton v. Vandervolgen*, 87 Ind. 361; *State v. Mackey*, 12 Ore. 154; *State v. Cooper*, 83 Mo. 698; *Gould v. Stafford*, 91 Cal. 146.

However, it has been held that evidence of use of expressions by the witness showing that he possessed ill-feeling toward a party is not competent unless the actual expressions are proved. *Cornelius v. State*, 12 Ark. 782; *Hatchett v. Gibson*, 13 Ala. 587; *State v. Bilansky*, 3 Minn. 169.

It has also been held that evidence of an unfriendly feeling of

the witness towards a party must be restricted to or reasonably near the time of the trial. *Higham v. Gault*, 15 Hun (N. Y.) 383. But see *State v. Dée*, 14 Minn. 35.

Such evidence must be to the point and not too far indirect or uncertain. *Gale v. New York, &c. R. Co.* 76 N. Y. 594.

The extent of the cross-examination to show bias rests very largely in the discretion of the judge. *Hinchcliff v. Koontz*, 121 Ind. 422, 23 N. E. 271.

A witness in a murder trial having testified that soon after the murder he visited the scene of the murder and that he took his rifle with him, and was sorry that the defendant was in trouble, may properly be asked if taking his rifle with him was intended as an expression of his sorrow. *People v. Thomson*, 92 Cal. 506.

The fact that a witness has brought a suit against a party does not show ill-will to such an extent that the witness must be discredited on account thereof. *Wischstadt v. Wischstadt*, 47 Minn. 358.

<sup>15</sup> *Munden v. Bailey*, 70 Ala. 63; *Polk v. State*, 62 Ala. 237; *State v. Glynn*, 51 Vt. 577; *Butler v. State*, 34 Ark. 480; *Conyers v. Field*, 61 Ga. 258; *Chelton v. State*, 45 Md. 564; *Langhome v. Commonwealth*, 76 Va. 1012; *Eldridge v. State*, 27 Fla. 162, 9 So. 448.

evidence of witnesses called to testify concerning it,<sup>16</sup> and there is an almost endless variety of situations or circumstances that may affect the credibility of a witness and be shown in a proper case and in a proper manner within the rule here under consideration.<sup>17</sup>

§ 974. **Impeachment by proof of inconsistent or contradictory statements made out of court—Laying the foundation.**—The mode most frequently resorted to in the impeachment of a witness is by proving that he made statements out of court inconsistent with or contradictory to what he has sworn to on the trial.<sup>18</sup> In order

<sup>16</sup> See *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199; *Swett v. Shumway*, 102 Mass. 365, 3 Am. R. 471; *People v. Anderson*, 105 Cal. 32, 38 Pac. 513; *State v. McGahey*, 3 N. Dak. 293, 55 N. W. 753, and authorities cited in following note below. But to contradict a witness as to the fact of hostility by evidence of contradictory statements or acts a foundation may have to be laid in many jurisdictions, as hereafter shown. But see *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189.

<sup>17</sup> Many illustrative cases are cited and reviewed in the elaborate note in 82 Am. St. 52-57. We cite a few of the most striking cases there reviewed, together with several additional authorities. *Martin v. State*, 125 Ala. 64, 28 So. 92; *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452; *People v. Turney*, 124 Mich. 542, 83 N. W. 273; *Totten v. Burhaus*, 103 Mich. 6, 61 N. W. 58; *People v. Worthington*, 105 Cal. 166, 38 Pac. 689; *People v. Bush*, 71 Cal. 602, 12 Pac. 781; *State v. McKinstry*, 100 Iowa, 82, 69 N. W. 267; *Askew v. People*, 23 Colo. 446, 48 Pac. 524; *Central R. Co. v. Maltsby*, 90 Ga. 630, 16 S. E. 953; *People v. Parker*, 137 N. Y. 535, 32 N. E. 1013; *Johnson*

*v. Wiley*, 74 Ind. 233; *Stone v. State*, 97 Ind. 347; *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118; *Robertson v. McPherson*, 4 Ind. App. 595, 31 N. E. 478; *Chicago, &c. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040. But see *State v. Punshon*, 133 Mo. 44, 34 S. W. 25; *Franklin v. Third Ave. R. Co.* 65 N. Y. S. 434; *Missouri, &c. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666; *Atlanta, &c. R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191; *Wischstadt v. Wischstadt*, 47 Minn. 358, 50 N. W. 225; *Holston v. Boyle*, 46 Minn. 432, 49 N. W. 203.

<sup>18</sup> *Wright v. Deklyne*, Pet. C. C. 199; *Floyd v. Wallace*, 31 Ga. 688; *Foot v. Hunkins*, 98 Mass. 523; *Nelms v. State*, 21 Miss. 500; *Keevans v. Brown*, 68 N. Car. 43; *Craig v. Rohrer*, 63 Ill. 325; *Worthing v. Worthing*, 64 Me. 335; *Ellis v. Harris*, 106 N. Car. 395; *Wixom v. Goodall*, 90 Cal. 622; *Kerr v. Hodge*, 39 Ill. App. 546; *Bonner v. Mayfield*, 82 Tex. 234; *Hess v. Redding*, 2 Ind. App. 199; *Consolidated Co. v. Keifer*, 134 Ill. 481, 23 Am. St. 688.

Testimony, offered avowedly to impeach the credit of a witness, by showing contradictory statements cannot, in the argument before the jury, be used for a wholly different purpose. *Williams v. Chapman*, 7 Ga. 467.

to do this the proper foundation must be laid by asking him if he made such a statement, and, to give the witness full opportunity to understand all the circumstances so as not to be taken off his guard, his attention must be directed to the time and place and person to whom or in whose presence the statement was made.<sup>19</sup> But this rule is to be given a practical application, and it is sufficient if the time, place, person and substance of the statement are designated with reasonable certainty, so that the witness will clearly understand

Where the credibility of a witness for the state has been attacked by showing that he has made contradictory statements out of court, and he is a stranger in the county, it is proper for the state to show that he has a good general reputation for truth and veracity. *Crook v. State*, 27 Tex. App. 198.

Where medical experts testified that certain books laid down certain conclusions, it was held competent to introduce such books for the purpose of impeachment. *Rip-on v. Bittel*, 30 Wis. 614.

The statement, "I did not see the pistol taken from Grubbs' person," is not contradicted by proof that the witness said "he knew nothing about a pistol on Grubbs." *Loving v. Commonwealth*, 80 Ky. 507.

The mere fact that the witness testified differently from what the party expected is not a sufficient reason for discrediting him. *Sanchez v. People*, 22 N. Y. 147.

<sup>19</sup> *Huffman v. State*, 28 Tex. App. 174; *Hart v. Hudson, &c. Co.* 84 N. Y. 56; *State v. Angelo*, 32 La. Ann. 407; *Krewson v. Purdom*, 13 Ore. 563; *State v. Baldwin*, 36 Kans. 1; *Klug v. State*, 77 Ga. 734; *Bates v. Holladay*, 31 Mo. App. 162; *Doe v. Reagan*, 5 Blackf. (Ind.) 217; *Franklin Bank v. Pennsylvania, &c. Co.* 11 Gill & J. (Md.) 28; *McKinney v. Neil*, 1 McLean (U. S.) 540; *United States v. Dickinson*, 2

*McLean (U. S.)* 325; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Beebe v. De Bauw*, 8 Ark. 510; *Regnier v. Cabot*, 7 Ill. 34; *Williams v. Turner*, 7 Ga. 348; *Johnson v. Kinsey*, 7 Ga. 428; *Palmer v. Haight*, 2 Barb. (N. Y.) 210; *Moore v. Bettis*, 11 Humph. (Tenn.) 67; *Chapin v. Siger*, 4 McLean (U. S.) 378; *Cheek v. Wheatly*, 11 Humph. (Tenn.) 556; *Clementine v. State*, 14 Mo. 112; *King v. Wicks*, 20 Ohio, 87; *Dillon v. Bell*, 9 Ind. 320; *Kennedy v. People*, 44 Ill. 283; *Patten v. People*, 18 Mich. 314; *State v. Johnson*, 12 Minn. 476; *State v. Batman*, 15 La. Ann. 166; *Pendleton v. Empire Stone Co.* 19 N. Y. 13; *Matthis v. State*, 33 Ga. 24; *Gaffney v. People*, 50 N. Y. 416, 423; *People v. Devine*, 44 Cal. 452; *Treadway v. State*, 1 Tex. App. 668; *State v. Kinley*, 43 Iowa, 294; *State v. McLaughlin*, 44 Iowa, 82; *Greer v. Higgins*, 20 Kans. 420; *State v. Glynn*, 51 Vt. 577; *Bock v. Weigant*, 5 Ill. App. 643; *Commonwealth v. Thyng*, 134 Mass. 191; *Hammond v. Dike*, 42 Minn. 273; *State v. Johnson*, 41 La. Ann. 574; *Stone v. Northwestern Sleigh Co.* 70 Wis. 585; *Fulton v. Hughes*, 63 Miss. 61; *Quincy Horse R. Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *Hoge v. People*, 117 Ill. 35; *Chicago, &c. R. Co. v. Lammert*, 19 Ill. App. 135; *Hooper v. Browning*, 19 Neb. 420; *State v. Goodwin*, 32 W. Va.

the matter and not be misled.<sup>20</sup> Indeed, it is sometimes impracticable to fully and specifically state all these matters, and, in such cases, if the attention is clearly called to the alleged conversation

177; *Clapp v. Engledow*, 72 Tex. 252; *State v. Cleary*, 40 Kans. 287; *Leahey v. Cass Ave &c. R. Co.* 97 Mo. 165; *State v. Coella*, 3 Wash. 99; *Parroski v. Goldberg*, 80 Wis. 339; *Perishable, &c. Co. v. O'Neill*, 41 Ill. App. 423; *State v. Howard*, 35 S. Car. 197; *Smith v. Traders' Nat. Bank*, 82 Tex. 368; *Salle v. Mayer*, 91 Cal. 165; *Hyden v. State* (Tex. App.), 20 S. W. 764; *Bonnelli v. Bowen*, 70 Miss. 142, 11 So. 791; *Hanscom v. Burmood*, 35 Neb. 504, 53 N. W. 371; *Spohn v. Missouri Pac. R. Co.* 116 Mo. 617, 22 S. W. 690. But in a few jurisdictions this rule is abrogated or modified. See *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Cronkrite v. Trexler*, 187 Pa. St. 100, 41 Atl. 22.

<sup>20</sup> *Kirschbaum v. Hanover, &c. Co.* 16 Ind. App. 606, 45 N. E. 1113; *Bennett v. O'Byrne*, 23 Ind. 604; *Wilkerson v. Rust*, 57 Ind. 172; *Evansville, &c. R. Co. v. Montgomery*, 85 Ind. 494; *Lawler v. McPheeters*, 73 Ind. 577; *Donahoo v. Scott* (Tex. Civ. App.), 30 S. W. 385; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *State v. Welch*, 33 Ore. 33, 54 Pac. 213; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Spohn v. Missouri Pac. R. Co.* 122 Mo. 1, 26 S. W. 663; *Ashton v. Ashton*, 11 S. Dak. 610, 79 N. W. 1001. But see *Green v. Southern Pac. R. Co.* 122 Cal. 563, 55 Pac. 577; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126; *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909.

The inquiry need not be limited

to the exact words. *Ritzman v. People*, 110 Ill. 362; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948.

While the usual practice is to ask the same question of both the impeached and impeaching witness, it is discretionary with the court to vary the method so as to elicit the truth. *Sloan v. New York, &c. R. Co.* 45 N. Y. 125.

Where the impeaching testimony was offered before the witness's attention was called to the conversation, but he was afterward allowed full opportunity to explain and deny, it was held that the error in order did not prejudice the witness. *Esterly v. Eppelsheimer*, 73 Iowa, 260.

That the account of a transaction given by a witness out of court is substantially inconsistent with that given upon the stand, is all that is required to render it admissible on the ground of contradiction. *Martin v. Farnham*, 25 N. H. 195.

In *Bennett v. O'Byrne*, 23 Ind. 604, the court, in speaking of the rule for impeaching witnesses by proof of contradictory statements and the reason for identifying the time and place of making the contradictory statement, said: "The rule upon this subject is a practical one, and is founded upon clear principles of common sense. The exact time of a conversation it is often impossible to fix, and to require it would be simply to cut off all opportunity of impeachment in such cases. The object to be at-

or statement, and circumstances are so detailed that there can be no misunderstanding, it will be sufficient, even though time, place

tained is to call the witness's attention to a particular conversation, so that he may not be taken by surprise. In some cases this can be done without any mention of time, as when the witness sought to be impeached remembers peculiar circumstances attending the alleged conversation. Usually, dates are the least efficient of all means which can be used to refresh one's memory of events, and sometimes they afford no aid whatever. Each case depends somewhat on its own circumstances. Where a witness frequently meets and converses with another at a particular place, there might be reason for requiring time to be fixed; where he never had but one conversation, and could remember the fact, there would be no reason whatever for any allusion to time." See *State v. Hoyt*, 13 Minn. 132; *Howe Machine Co. v. Clark*, 15 Kans. 492; *Evansville, &c. R. Co. v. Montgomery*, 85 Ind. 494; *Union, &c. Board v. Trimble*, 33 La. Ann. 1073; *Mayer v. Appel*, 13 Ill. App. 87; *Mahaney v. St. Louis, &c. R. Co.* 108 Mo. 191, 18 S. W. 895.

Evidence offered to show the improbability of a transaction, as stated by a witness, but having no tendency to show that he had given a different account of it, is not a mode of impeaching him known to the law. *Shaw v. Emery*, 42 Me. 59.

Where a subscribing witness to a will testifies on the trial to its due execution by a competent testator, evidence that he had previously

said that it was not worth a snap of his fingers, and might be broken, is admissible by way of impeachment. *Beaubien v. Cicotte*, 12 Mich. 459.

The rule of calling the attention of a witness to the previous statement, applies even where the previous statement is contained in a deposition taken by the witness. *State v. Collins*, 32 Iowa, 36; *Bradford v. Barclay*, 39 Ala. 33; *Legg v. Leyman*, 8 Blackf. (Ind.) 148. See, also, *Jenkins v. Lutz*, 26 Ind. App. 150, 59 N. E. 288; *Eppert v. Hall*, 133 Ind. 417. But compare *Billings v. Metropolitan Ins. Co.* 70 Vt. 477, 41 Atl. 516; *Williams v. Chapman*, 7 Ga. 467.

In a case where a party to the suit is a witness in his own behalf, it is not necessary to lay the usual foundation for impeaching him by proof of contradictory statements. *Collins v. Mack*, 31 Ark. 684.

A witness cannot be impeached after his decease because no foundation can be laid. *State v. Johnson*, 35 La. Ann. 871.

The question: "Did you not state in the month of September in the presence of A B and C D, on the way between town here and the race track, that you would go into court and swear anything at all that would injure the Thomases?" is sufficiently definite to form a foundation for impeachment. *People v. Turner*, 65 Cal. 540.

Where the witness is sought to be impeached by proof of hostility, the proper foundation must be laid. *State v. Stewart*, 11 Ore. 238.

and person are not all fully and specifically designated. If a witness, on being interrogated as to whether or not he has at a certain time and place made certain statements, replies that he does not remember whether he did or not, or where he refuses to answer at all to the question no further foundation for impeachment is necessary, and proof of the alleged contradictory statements may then be introduced.<sup>21</sup> But there are a few authorities which hold that such evidence is not admissible if he says that he does not remember or has no recollection of the matter.<sup>22</sup>

<sup>21</sup> *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596; *Sealy v. State*, 1 Ga. 213; *Lewis v. State*, 4 Kans. 296; *Gibbs v. Linabury*, 22 Mich. 479; *People v. Jackson*, 3 Park. (N. Y.) Cr. 590; *Janeway v. State*, 1 Head (Tenn.) 130; *Ray v. Bell*, 24 Ill. 444; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Nute v. Nute*, 41 N. H. 60; *Gregg v. Jamison*, 55 Pa. St. 468; *Jones v. People*, 2 Colo. 351; *Payne v. State*, 60 Ala. 80; *Dufresne v. Weise*, 46 Wis. 290; *Reagan v. Mabry*, 8 Baxt. (Tenn.) 168; *People v. Lee Ah Yute*, 60 Cal. 95; *State v. McFarlain*, 41 La. Ann. 686, 6 So. 728; *Brown v. State*, 79 Ala. 61; *Heddles v. Chicago, &c. R. Co.* 74 Wis. 239, 42 N. W. 237; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108; *Long v. North British, &c. Co.* 137 Pa. St. 335, 20 Atl. 1014; *Aneals v. People*, 134 Ill. 401; *Omaha, &c. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126; *Wilson v. Wilson*, 137 Pa. St. 269, 20 Atl. 644; *Floyd v. Thomas*, 108 N. Car. 93.

"Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but only such

statements as are relevant are admissible, and, in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them (and, as I conceive, for that purpose only), the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstances sufficient to designate the particular occasion. If the witness, on the cross-examination admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission and you may give evidence on the other side to prove that the witness did say what is imputed—always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember." *Parke, B., Crowley v. Page*, 7 Car. & P. 789, 791, 32 E. C. L. 737.

<sup>22</sup> *Wiggins v. Holman*, 5 Ind. 503; *McVey v. Blair*, 7 Ind. 590; *Robinson v. Pitzer*, 3 W. Va. 335. See, also, *Long v. Hitchcock*, 9 C. & P. 619; *Reizenstein v. Clark*, 104 Iowa,



§ 975. **Impeachment by contradictory statements continued—**  
**Writings.**—A witness may also be contradicted by proof of a written statement inconsistent with or contradictory to one made on the witness stand during the trial of the cause,<sup>23</sup> but the proof of the written statement must generally be made by producing the writing or a certified copy of it.<sup>24</sup> A mere opinion expressed by a witness inconsistent with a fact testified to by him cannot be given in evi-

287, 73 N. W. 588, and see post § 976 as to the rule where the matter is irrelevant. But the Indiana decisions above cited are not the law under the present statute. *Curme, &c. Co. v. Rauh*, 100 Ind. 247. Other cases holding that a witness may be impeached by contradictory statements even though he says that he does not remember, are *Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. 826; *Kelly v. Cohoer, &c. Co.* 40 N. Y. S. 477.

<sup>23</sup> *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; *Wormeley v. Commonwealth* 10 Gratt. (Va.) 658; *Jefferds v. People*, 5 Park. Cr. (N. Y.) 522; *Thayer v. Gallup*, 13 Wis. 603; *Drew v. Wadleigh*, 7 Me. 94; *Hook v. George*, 108 Mass. 324; *Tabor v. Judd*, 62 N. H. 288; *Foster v. Worthing*, 146 Mass. 607; *Anthony v. Jones*, 39 Kans. 529; *Sharp v. Hall*, 86 Ala. 110.

The notes taken by a judge of the testimony of a witness on a former trial cannot be read to impeach the witness, the judge not being able to testify to their correctness. *Huff v. Bennett*, 6 N. Y. 337.

A witness, who had testified that he never knew of the existence of a certain watercourse, answered on cross-examination that he did sign

a petition to have this watercourse reopened, but did not read its contents, and was told at the time by the person presenting it that it was a petition for a new drain. Held, that the person who presented it having testified that he explained the contents to him, the petition was admissible in evidence to contradict the witness. *Hastings v. Livermore*, 15 Gray (Mass.) 10.

<sup>24</sup> *Morrison v. Myers*, 11 Iowa, 538; *Callanan v. Shaw*, 24 Iowa, 441; *Peck v. Parchen*, 52 Iowa, 46.

An impeaching letter must be shown to the witness. *Horton v. Chadbourn*, 31 Minn. 322; *Floyd v. State*, 82 Ala. 16.

Where a document is offered to contradict a witness, it must be first identified as the one referred to by him. *West v. State*, 22 N. J. L. 212.

In cross-examining a witness as to the contents of a letter, or other paper, written by him, with a view to impeach his testimony, the letter or paper must be first shown to him, before counsel will be permitted to represent, in his interrogatory, the contents of the writing. *Stamper v. Griffin*, 12 Ga. 450.

The writing should be shown him in order to give him an opportunity to explain it. *State v. Kinney*, 36 W. Va. 141; *Richmond v. Sundburg*, 77 Iowa, 255; *People v. Lee Chuck*, 78 Cal. 317.

dence to impeach his credibility.<sup>25</sup> But inconsistent acts and conduct as well as inconsistent statements may be shown in a proper case.<sup>26</sup> The testimony of a witness at a former trial is frequently introduced for the purpose of impeaching him,<sup>27</sup> and there is no doubt that a witness may be so contradicted and impeached in a proper case and in a proper manner. The rules already stated, as well as the rule hereafter stated in the next section, generally govern, and the same principle is applied to impeachment by proof of statements on preliminary examinations, coroner's inquests, and in depositions, affidavits and various other documents of a similar character.<sup>28</sup>

<sup>25</sup> *Holmes v. Anderson*, 18 Barb. (N. Y.) 420; *Schell v. Plumb*, 55 N. Y. 592; *Rucker v. Beaty*, 3 Ind. 70; *City Bank v. Young*, 43 N. H. 457; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Commonwealth v. Mooney*, 110 Mass. 99; *People v. Stackhouse*, 49 Mich. 76, 13 N. W. 364.

<sup>26</sup> *Omaha, &c. R. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. 185; *Spalding v. Merrimack*, 67 N. H. 382, 36 Atl. 253; *State v. Lurch*, 12 Ore. 104, 6 Pac. 411; *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649; *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33 (by cross-examination). See, also, *Hyland v. Milner*, 99 Ind. 308; *Miller v. Baker*, 160 Pa. St. 172, 28 Atl. 648; *Fitzgerald v. Williams*, 148 Mass. 462, 20 N. E. 100; *Daniels v. Weeks*, 90 Mich. 190, 51 N. W. 273. But compare *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414; *Patterson v. Wilson*, 101 N. Car. 594, 8 S. E. 341.

<sup>27</sup> *Commonwealth v. Mead*, 12 Gray (Mass.) 167; *Pearce v. Furr*, 10 Miss. 54; *Chesley v. Chesley*, 37 N. H. 229; *Briggs v. Taylor*, 35 Vt. 57; *Beebe v. De Bauw*, 8 Ark. 510; *Milan v. State*, 24 Ark. 346; *Way v. Butterworth*, 106 Mass. 75; *Gibbs v. Linabury*, 22 Mich. 479; *State v. McDonald*, 65 Me. 466; *State v.*

*Tickel*, 13 Nev. 502; *Brown v. State*, 76 Ga. 623; *Hudson v. State*, 28 Tex. App. 323; *Bennett v. Syndicate Ins. Co.* 43 Minn. 45; *Brown v. State*, 76 Ga. 623; *State v. Pierce*, 91 N. Car. 606; *People v. Bushton*, 80 Cal. 160; *Reid v. State*, 81 Ga. 760; *State v. Banister*, 35 S. Car. 290; *State v. Jordan*, 110 N. Car. 491; *Lewis v. State*, 91 Ga. 168, 16 S. E. 986; *Klotz v. James*, 96 Ia. 1, 59 Am. St. 348, 64 N. W. 648; *Kreibolum v. Yancey*, 154 Mo. 67, 55 S. W. 260.

Evidence may be given that a witness swore directly the opposite at a former trial, in order to discredit him. *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281.

The report of evidence, though signed by the presiding judge, has been held not admissible to show what the witness testified on the former trial, for the purpose of contradicting him. *Webster v. Calden*, 55 Me. 165.

But the notes of a stenographer taken at a former trial may be used to impeach the witness. *Chicago, &c. R. Co. v. Robinson*, 16 Ill. App. 229.

The entire testimony of the witness at the former trial should be read or called to his attention. *Kennedy v. State*, 85 Ala. 326.

<sup>28</sup> See *State v. Mulholland*, 16 La.

**§ 976. Contradictory statements in writing—Manner of impeachment.**—Where the contradictory statement is in writing, and it is intended to impeach the witness thereby, the attention of the witness should be called to the contradictory part, and, usually, the writing must be shown to him and he must be asked if he wrote it or made such statements.<sup>29</sup> The rule in England is thus stated by an English writer: "A witness under cross-examination (or a witness whom the judge has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony) may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him (or being proved in the first instance); but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him."<sup>30</sup>

**§ 977. Contradictory statements—Must be relevant and not collateral.**—The contradictory statements alleged to have been made by the witness to be impeached and on which he has been cross-examined, must be material and relevant to the issues presented

Ann. 376; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *Yoki v. First State Bank*, 87 Minn. 295, 91 N. W. 1101; *Commonwealth v. Chance*, 174 Mass. 245, 54 N. E. 551, 75 Am. St. 306; *Jackson v. State*, 33 Tex. Cr. App. 281, 26 S. W. 194, 622, 47 Am. St. 30; *Brown v. State*, 76 Ga. 623; *Kennedy v. State*, 85 Ala. 326, 5 So. 300; *Williams v. Miller*, 6 Kans. App. 626, 49 Pac. 703; *Walrod v. Webster County*, 110 Ia. 349, 81 N. W. 598; *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299; *Chicago, &c. R. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, and numerous cases cited in 82 Am. St. 46-50.

<sup>29</sup> *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Dunbar v. McGill*, 69 Mich. 297; *Gunter v. State*, 83 Ala. 96; *State v. Carden*, 84 Ala. 417; *Bellinger v. People*, 8 Wend. (N.

Y.) 595, 598; *State v. Steeves*, 29 Ore. 85, 43 Pac. 947; *Foster v. Worthing*, 146 Mass. 607; *Robinson v. State*, 68 Ga. 833. See, also, *Queen's Case*, 2 B. & B. 288; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307.

<sup>30</sup> *Stephen Dig. Ev. art. 132.* It has been held that the witness may be shown only the contradictory part, and that if he denies writing it, he cannot be examined on the contents of the writing, nor is the opposite counsel entitled to look at it. *Reg. v. Duncombe*, 8 C. & P. 369. See, also, *Randolph v. Woodstock*, 35 Vt. 295; *Morrison v. Myers*, 11 Iowa, 539; *Toplitz v. Hedden*, 146 U. S. 254, 13 Sup. Ct. 70, as tending to support the view that the writing need not always be shown to the witness. And see *Hanlon v. Ehrich*, 80 N. Y. S. 692.

by the trial; proof of contradictory statements which are immaterial and collateral or irrelevant is not competent to impeach the witness.<sup>31</sup>

<sup>31</sup> *Crittenden v. Commonwealth*, 82 Ky. 164; *Sloan v. Edwards*, 61 Md. 89; *Anderson v. State*, 34 Ark. 257; *McKeone v. People*, 6 Colo. 346; *Billings v. State*, 52 Ark. 303; *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Morris v. Atlantic, &c. R. Co.* 116 N. Y. 552; *Elkhart v. Witman*, 122 Ind. 538; *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698; *State v. Blakesley*, 43 Kans. 250; *State v. Reick*, 43 Kans. 635; *Henderson v. State*, 1 Tex. App. 432; *People v. Tiley*, 84 Cal. 651; *Marx v. Bell*, 48 Ala. 497; *People v. Furtado*, 57 Cal. 345; *Madden v. Koester*, 52 Iowa, 692; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Davis v. Keyes*, 112 Mass. 436; *Howard v. Patrick*, 43 Mich. 121; *State v. Spaulding*, 34 Minn. 361, 25 N. W. 793; *Gaudolfo v. Appleton*, 40 N. Y. 533; *Sutor v. Wood*, 76 Tex. 408; *Clinton v. State*, 33 Ohio St. 27; *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700; *Brite v. State*, 10 Tex. App. 368; *United States v. Dickinson*, 2 McLean (U. S.) 325; *Washington v. State*, 63 Ala. 189; *Fogleman v. State*, 32 Ind. 145; *State v. Benner*, 64 Me. 267; *Kaler v. Builders', &c. Co.* 120 Mass. 333; *Harper v. Indianapolis, &c. R. Co.* 47 Mo. 567; *Goodall v. State*, 1 Ore. 333; *Commonwealth v. Farrar*, 10 Gray (Mass.) 6; *Combs v. Winchester*, 39 N. H. 13; *Brackett v. Weeks*, 43 Me. 291; *Hildeburn v. Curran*, 65 Pa. St. 59; *Davis v. Roby*, 64 Me. 427; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *People v. Webb*, 70 Cal. 120; *Kramer v. Thomson-Houston Co.* 95 N. Car. 277; *State v. Falconer*, 70

Iowa, 416; *State v. Glisson*, 93 N. Car. 506; *Welch v. State*, 104 Ind. 347; *Clark v. Reiniger*, 66 Iowa, 507; *Eikenberry v. Edwards*, 67 Iowa, 14; *Cotton v. State*, 87 Ala. 75; *Paddock v. Kingsley*, 41 Minn. 528; *Fitzgerald v. Williams*, 148 Mass. 462; *Hussey v. State*, 87 Ala. 121; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551.

The rule that testimony collateral to the issue cannot be contradicted, is confined to testimony introduced in cross-examination, by the party who proposes to contradict it. It does not apply to testimony introduced by the other party. *State v. Sargent*, 32 Me. 429.

A witness's testimony on cross-examination, that he did or did not make a certain statement as to a matter not material to the issue, cannot be contradicted, unless it has a bearing upon his feelings toward one of the parties. *Sumner v. Crawford*, 45 N. H. 416; *Dewey v. Williams*, 43 N. H. 384.

However, if the question is at all material to the issue, the answer of the witness may generally be contradicted. *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Commonwealth v. Buzzell*, 16 Pick. (Mass.) 153; *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Noonan v. Ilsley*, 22 Wis. 27; *Smith v. Henry*, 2 Bailey (S. Car.) 118; *Ortez v. Jewett*, 23 Ala. 662; *Derby v. Gallup*, 5 Minn. 119; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Hicks v. Stone*, 13 Minn. 434.

The propriety of allowing questions irrelevant to the issue rests somewhat in the discretion of the

If a party seeking to impeach a witness cross-examines him in regard to a matter which is irrelevant, immaterial and collateral to the issues on trial, such party is, as a general rule, bound by the answers of the witness, and cannot introduce evidence to disprove them.<sup>32</sup> In

trial judge. *State v. McCarty*, 17 Minn. 76; *Muller v. St. Louis Assc.* 73 Mo. 242.

"The extent of the cross-examination of a witness upon matters immaterial to the issue, is in the discretion of the judge before whom the trial is conducted. Inquiries on irrelevant topics to discredit the witness, and to what extent a course of irrelevant inquiry may be pursued, are matters, in this state and in England, committed to the sound discretion of the trial court; and this is the rule as regards the right of inquiry into all matters wholly collateral and immaterial to the issue. The court in which the trial is conducted may permit disparaging inquiries on matters irrelevant to the issue, where the ends of justice would seem to demand it, and may exclude them without infringing upon any legal right of the parties; and the exercise of this discretion is not the subject of review, except in plain cases of abuse and injustice. *La Beau v. People*, 34 N. Y. 223.

In a seduction case the girl seduced is only a witness and not a party, and statements she may have made to her attorney are privileged and cannot be used to impeach her. *Bowers v. State*, 29 Ohio St. 542.

Where a witness testified at a preliminary hearing and his testimony was reduced to writing, in order to impeach him at a subsequent hearing, such testimony must be produced and his attention

called to it. *State v. Callegari*, 41 La. Ann. 578.

Where a passenger, suing a railway for personal injuries, testifies on cross-examination that he did not go on the platform at the station next to the one at which he was injured, it appearing that such matter was immaterial, contradiction testimony of such statement was properly held inadmissible. *Lake Erie, &c. R. Co. v. Morain*, 140 Ill. 117, 29 N. E. 869.

<sup>32</sup> *Beckman v. Skaggs*, 59 Cal. 541; *People v. Bell*, 53 Cal. 119; *People v. McKeller*, 53 Cal. 65; *People v. Devine*, 44 Cal. 452; *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *Rosenbaum v. State*, 33 Ala. 354; *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Central, &c. R. Co. v. Brunson*, 63 Ga. 504; *Wilkinson v. Davis*, 34 Ga. 549; *McLeod v. Bullard*, 84 N. Car. 515; *State v. Elliott*, 68 N. Car. 124; *Clark v. Clark*, 65 N. Car. 655; *State v. Pulley*, 63 N. Car. 8; *State v. Patterson*, 2 Ired. (N. Car.) 346; *Carpenter v. Lingenfelter*, 42 Neb. 728, 60 N. W. 1022; *Tenny v. Mulvaney*, 8 Ore. 513; *State v. Staley*, 14 Minn. 105; *French v. O'Conner*, 39 Mich. 106; *Patten v. People*, 18 Mich. 314; *Clark v. Reiniger*, 66 Iowa, 508; *Taylor v. Pickett*, 52 Iowa, 467; *Cokely v. State*, 4 Iowa, 477; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Alling v. Cook*, 49 Conn. 574; *Winton v. Meeker*, 25 Conn. 456; *Learned v. Hall*, 133 Mass. 417; *Commonwealth v. Duncan*, 128 Mass. 422; *Eames v. Whittaker*, 123 Mass. 342;

order to render statements made out of court, which are alleged to be contradictory to those made by the witness on the trial, competent, the witness must, as we have shown, first be asked on his cross-examination regarding such statements.<sup>33</sup> The test generally adopted for determining whether the matter is a collateral or material one is this, "Would the cross-examining party be allowed to prove it as

*Com. v. Farrar*, 10 Gray (Mass.) 6; *State v. Thibreau*, 30 Vt. 100; *Seavy v. Dearborn*, 19 N. H. 351; *Tibbetts v. Flanders*, 18 N. H. 284; *Stevens v. Beach*, 12 Vt. 585, 36 Am. Dec. 359; *Lewis v. Barker*, 55 Vt. 21; *State v. Kingsbury*, 58 Me. 239; *Ware v. Ware*, 8 Me. 42; *United States v. White*, 5 Cranch (C. C.) 38; *McKeone v. People*, 6 Colo. 346; *Goodhand v. Benton*, 6 Gill & J. (Md.) 481; *Carpenter v. Ward*, 30 N. Y. 243; *Rosenweig v. People*, 63 Barb. (N. Y.) 634; *Hildeburn v. Curran*, 65 Pa. St. 59; *Hester v. Commonwealth*, 85 Pa. St. 139; *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251.

A party may, after cross-examining an opposing witness, with the consent of the court, recall such witness for the purpose of laying a foundation for impeaching him. He does not, by so recalling the witness, make him his own. *State v. Jones*, 64 Mo. 391.

<sup>33</sup> *McKinney v. Neil*, 1 McLean (U. S.) 540; *Howell v. Reynolds*, 12 Ala. 128; *Powell v. State*, 19 Ala. 577; *Mendenhall v. Banks*, 16 Ind. 284; *Rice v. Cunningham*, 29 Cal. 492; *Root v. Wood*, 34 Ill. 283; *Williams v. Turner*, 7 Ga. 348; *Matthis v. State*, 33 Ga. 24; *Regnier v. Cabot*, 7 Ill. 34; *Winslow v. Newlan*, 45 Ill. 145; *Stewart v. Chadwick*, 8 Iowa, 463; *Matthews v. Dare*, 20 Md. 248; *Strunk v. Ochiltree*, 15 Iowa, 179; *Smith v. People*, 2 Mich. 416; *Able v. Shields*, 7 Mo. 120; *Clementine v. State*, 14 Mo.

113; *Valton v. National, &c. Co.* 20 N. Y. 32; *Palmer v. Haight*, 2 Barb. (N. Y.) 210; *Budlong v. Van Nostrand*, 24 Barb. (N. Y.) 25; *McAteer v. McMullen*, 2 Pa. St. 32; *Wright v. Cumpsty*, 41 Pa. St. 102; *Scott v. King*, 7 Minn. 494; *Moore v. Bettis*, 11 Humph. (Tenn.) 67; *Unis v. Charlton*, 12 Gratt. (Va.) 484; *Drennen v. Lindsey*, 15 Ark. 359; *Atkins v. State*, 16 Ark. 568.

Contra: *Wilkins v. Babbershall* 32 Me. 184; *Hedge v. Clapp*, 22 Conn. 262; *Titus v. Ash*, 24 N. H. 319; *Gould v. Norfolk Co.* 9 Cush. (Mass.) 338; *Cook v. Brown*, 34 N. H. 460.

Where the object is to impeach a witness, by showing that he has made declarations inconsistent with his testimony, it is not necessary, in laying the predicate, that the language used by the witness should be stated, but the substance of what he is supposed to have said is all that is required. *Nelson v. Iverson*, 17 Ala. 216; *Armstrong v. Huffstutter*, 19 Ala. 51.

A witness testifying by deposition cannot be contradicted by evidence of his statements in a deposition taken in another suit, without the foundation therefor be first laid by inquiring of the witness whether or not he has made such statements; but depositions taken in the same suit are in effect one deposition, and as to them the rule is otherwise. *Hughes v. Wilkinson*, 35 Ala. 453.

a part of his case tending to establish his plea?"<sup>34</sup> Proof of such matters as the following has been held competent to impeach the witness, namely, that he proposed to secure testimony for the party cross-examining him if he was paid money for it;<sup>35</sup> that he had been guilty of subornation in the same trial;<sup>36</sup> and that he had made threats against the party cross-examining him.<sup>37</sup>

### § 978. Impeachment by proof of bad reputation—In general.—

A party has a right to impeach an opposing witness by proof of bad reputation.<sup>38</sup> As to how far such proof may go the decisions are in conflict and almost equally divided, but the weight of authority and reason seems to be in favor of the doctrine that such proof should extend only to the reputation of the witness for truth and veracity,<sup>39</sup> where there is no statutory provision extending the right

<sup>34</sup> *George Burke Co. v. Fowler* (Neb.), 93 N. W. 760; *Saunders v. City, &c. R. Co.* 99 Tenn. 130, 41 S. W. 1031; *Hildeburn v. Curran* 65 Pa. St. 659; *Briggs v. Hervey*, 130 Mass. 186; *State v. Patterson*, 74 N. Car. 157; *Woodard v. Eastman*, 118 Mass. 403; *Attorney Gen'l v. Hitchcock*, 1 Exch. 91, 99. See, also, for another statement of the test, *Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203. And see generally, *Welch v. State*, 104 Ind. 347, 3 N. E. 850; *Williams v. State*, 73 Miss. 820, 19 So. 826; *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982; *Askew v. People*, 23 Colo. 446, 48 Pac. 524.

<sup>35</sup> *Tullis v. State*, 39 Ohio St. 200; *Lewis v. Steiger*, 68 Cal. 200.

<sup>36</sup> *Newton v. Harris*, 6 N. Y. 345; *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *Hill v. State*, 18 Tex. App. 665.

<sup>37</sup> *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Munden v. Bailey*, 70 Ala. 63; *Reg. v. Yewin*, 2 Campb. 638, n.; *Emerson v. Stevens*, 6 Allen (Mass.) 112; *Phenix v. Castner*, 108 Ill. 207.

<sup>38</sup> See authorities cited in next two notes.

A witness who admits to having

assisted in the perpetration of a fraud, is impeached. *Davis v. Council*, 92 N. Car. 725.

Such proof should be confined to his reputation at the time the inquiry is made. *Wood v. Matthews*, 73 Mo. 477; *Mitchell v. Commonwealth*, 78 Ky. 219.

Impeaching evidence as to veracity may be offered without notice as to intention to give it. *Knight v. House*, 29 Md. 194.

Mere contradiction among witnesses is no ground for admitting evidence as to the general character of either of them for truth and veracity. Their character must be specially assailed. *Saussey v. South Fla. Co.* 22 Fla. 327.

<sup>39</sup> *United States v. Vansickle*, 2 McLean (U. S.) 219; *United States v. Masters*, 4 Cranch (C. C.) 479; *Nugent v. State*, 18 Ala. 521; *Taylor v. Clendening*, 4 Kans. 524; *Shaw v. Emery*, 42 Me. 59; *Craig v. State*, 5 Ohio St. 605; *Clark v. Bailey*, 2 Strobb. Eq. (S. Car.) 143; *Crabtree v. Kile*, 21 Ill. 180; *Atwood v. Impson*, 20 N. J. Eq. 150; *Rixey v. Bayse*, 4 Leigh (Va.) 330; *Frye v. Bank*, 11 Ill. 367; *Bank*

beyond that limit. There are, however, many respectable authorities which hold that such proof may embrace the general moral character of the witness.<sup>40</sup> In some jurisdictions the right to inquire as to the

v. Coote, 3 Cranch (C. C.) 169; Carter v. Cavanaugh, 1 Greene (Iowa) 171; Phillips v. Kingfield, 19 Me. 375; Newman v. Mackin, 13 Sm. & M. (Miss.) 383; Boon v. Weathered, 23 Tex. 675; Ayres v. Duprey, 27 Tex. 593; Kilburn v. Mullen, 22 Iowa, 498; People v. Yales, 27 Cal. 630; State v. Morse, 67 Me. 428; Ordway v. Haynes, 50 N. H. 159; People v. Abbott, 97 Mich. 484, 56 N. W. 862; Hamilton v. People, 29 Mich. 173; Reese v. Huntingdon, 23 How. (U. S.) 2; Dimick v. Downs, 82 Ill. 570; Warner v. Lockerby, 31 Minn. 321, 18 N. W. 145, 821; Moreland v. Lawrence, 23 Minn. 84; Kennedy v. Upshaw, 66 Tex. 442, 1 S. W. 308; Robinson v. State, 16 Fla. 835; Cook v. Hunt, 24 Ill. 536, 550; State v. Bruce, 24 Me. 71; Smith v. State, 58 Miss. 867; Kelley v. Proctor, 41 N. H. 139; Wilds v. Blanchard, 7 Vt. 141.

In impeachment the word "character" is used not to mean what a man actually is, but what he is reputed to be. Dave v. State, 22 Ala. 23; Ford v. Ford, 7 Humph. (Tenn.) 100; Sonelle v. Craig, 9 Ala. 534.

In this inquiry for the purposes of impeachment, "character" and "reputation" are often used synonymously. Knode v. Williamson, 17 Wall (U. S.) 586.

In *Rudsdill v. Slingerland*, 18 Minn. 383, the court gave this very excellent statement of the rule: "The only object in inquiring into the character of a witness is to ascertain whether his statements,

in themselves, are entitled to credit. If he is a truthful person, they are; otherwise, they are not. A witness, therefore, in coming into court, would perhaps properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but is not responsible to answer, or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness, and his reputation for truthfulness, may be unimpeachable. An inquiry in such a case as to his moral character would mislead, instead of assist, in arriving at the object of investigation, namely, his credibility; it would, in any event, be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice."

The inquiries must be confined to his reputation for truth and veracity "in the neighborhood in which he lives." *State v. Johnson*, 41 La. Ann. 574.

<sup>40</sup>*People v. Beck*, 58 Cal. 212; *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *State v. Hart*, 67 Iowa, 142, 25 N. W. 99; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260; *State v. Shields*, 13 Mo. 236; *Gilliam v. State*, 1 Head (Tenn.) 38; *State v. Breeden*, 58 Mo. 507; *State v. Rugan*, 5 Mo. App. 592; *State v. Stallings*, 2 Hayw.



general moral character is statutory.<sup>41</sup> The impeaching testimony must, under either rule, be addressed to the general reputation rather than to specific acts, and proof of particular facts and acts of immorality, which tend to mar the reputation of the witness is not, ordinarily, permissible.<sup>42</sup> Thus, it has been held that such evidence

(N. Car.) 300; *People v. Mather*, 4 Wend. (N. Y.) 230, 257; *State v. Grant*, 76 Mo. 239; *Tacket v. May*, 3 Dana (Ky.) 79; *State v. Eagan*, 59 Iowa. 636; *Majors v. State*, 29 Ark. 112; *Du Bose v. Du Bose*, 75 Ga. 753; *Motes v. Bates*, 80 Ala. 382; *DeKalb Co. v. Smith*, 47 Ala. 407; *Johnson v. State*, 61 Ga. 305; *Ratleree v. Chapman*, 79 Ga. 574; *Rawles v. State*, 56 Ind. 433; *State v. Rider*, 95 Mo. 474; *State v. Bulla*, 89 Mo. 595; *Leverich v. Frank*, 6 Ore. 212; *Merriman v. State*, 3 Lea (Tenn.) 393; *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706; *Mitchell v. State*, 94 Ala. 68, 10 So. 518; *State v. May*, 142 Mo. 135, 43 S. W. 637. See generally 30 Cent. Law Jour. 241.

<sup>41</sup> *Walton v. State*, 88 Ind. 9; *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Froelich*, 70 Iowa, 213, 30 N. E. 487; *People v. Bentley*, 77 Cal. 7, 18 Pac. 799; *Cline v. State*, 51 Ark. 140, 10 S. W. 225. But see under Utah Statute, *State v. Marks*, 16 Utah, 204, 51 Pac. 1089.

<sup>42</sup> *State v. Sibley*, 132 Mo. 103, 33 S. W. 167, 53 Am. St. 477 and note; *Conley v. Meeker*, 85 N. Y. 618; *State v. Jackson*, 44 La. Ann. 160; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Taylor v. Com.* 3 Bush (Ky.) 508; *Wilson v. State*, 16 Ind. 392; *Griffith v. State*, 140 Ind. 163, 39 N. E. 440; *Barton v. Morpheus*, 2 Dev. (N. Car.) 520; *Wike v. Lightner*, 11 S. & R. (Pa.) 198; *Walker v. State*, 6 Blackf. (Ind.) 1; *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Rhea v. State*, 100

Ala. 119, 14 So. 853; *Shaw v. Emery*, 42 Me. 59; *Root v. Hamilton*, 105 Mass. 22; *Spears v. Forrest*, 15 Vt. 435; *Evans v. Smith*, 5 Monroe (Ky.) 364; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785, 792; *Leverich v. Frank*, 6 Ore. 212; *Moore v. State*, 68 Ala. 360; *Smith v. State*, 88 Ala. 73; *State v. Barrett*, 40 Minn. 65; *State v. Garland*, 95 N. Car. 671; *Sloan v. Edwards*, 61 Md. 89; *Ketchingman v. State*, 6 Wis. 417; *State v. Rogers*, 108 Mo. 202, 18 S. W. 976; *Sweet v. Gilmore*, 52 S. Car. 530, 30 S. E. 395.

It is not competent to confine the inquiries to the witness' reputation for honesty. *Davenport v. State*, 85 Ala. 336.

Proof of single acts of adultery is incompetent. *Johnson v. State*, 61 Ga. 305.

The fact that a witness falsely took the "iron-clad oath" after the civil war cannot be shown as affecting his general reputation for truth and veracity. *Moore v. Moore*, 73 Tex. 382.

But "evidence as to the general moral character of the witness being admissible, it must follow that anything showing deterioration of that general moral character or reputation is also admissible." *State v. Grant*, 79 Mo. 113. However, this rule could only have application in those states in which proof of general moral character is held admissible for the purpose of impeachment.

Requiring the witness to state

cannot be introduced to show want of chastity,<sup>43</sup> that the witness is a common prostitute,<sup>44</sup> a horse-thief,<sup>45</sup> a counterfeiter,<sup>46</sup> or a person of intemperate habits.<sup>47</sup> But whether this rule prohibits the cross-examination of the witness himself as to such matters is a question that is not well settled, and, while there is little conflict upon the proposition that particular acts of immorality cannot be so proved by third persons, authorities in the same jurisdiction differ as to whether the witness may be cross-examined as to such matters for the purpose of discrediting him. Thus, it is said that upon a cross-examination of a witness with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way. For example, for the purpose of impair-

that he was a deserter from the United States army is not permissible for the purposes of impeachment. *Gulf, &c. R. Co. v. Johnson*, 83 Tex. 628.

Nor is it proper to prove by plaintiff, on cross-examination, that she is an habitual litigant. *Palmeri v. Manhattan, &c. R. Co.* 133 N. Y. 261.

<sup>43</sup> *People v. Mills*, 94 Mich. 630, 54 N. W. 488; *State v. Morse*, 67 Me. 428; *Kilburn v. Mullen*, 22 Iowa, 498; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Gilchrist v. McKee*, 4 Watts (Pa.) 380; *Boles v. State*, 46 Ala. 204; *Ketchingman v. State*, 6 Wis. 426; *Commonwealth v. Moore*, 3 Pick. (Mass.) 194; *People v. Yolus*, 27 Cal. 630; *State v. Gay*, 94 N. Car. 814; *State v. Eberline*, 47 Kans. 155. Except in a certain class of cases of rape, or the like. See 30 Cent. Law Jour. 241.

That a female witness has borne a bastard child cannot be given in evidence to destroy her credit. *Weathers v. Barksdale*, 30 Ga. 888; *Merriman v. State*, 3 Lea (Tenn.) 393.

A male witness' veracity cannot be impeached by proof of his general reputation for unchastity. *State*

*v. Clawson*, 30 Mo. App. 139; *State v. Coffey*, 44 Mo. App. 455.

<sup>44</sup> *Bakeman v. Rose*, 14 Wend. (N. Y.) 105; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Spears v. Forrest*, 15 Vt. 435; *State v. Smith*, 7 Vt. 141; *Commonwealth v. Churchill*, 11 Met. (Mass.) 538; *State v. Randolph*, 24 Conn. 363; *Dimick v. Downs*, 82 Ill. 570; *Birmingham, &c. R. Co. v. Hale*, 90 Ala. 8.

Contra: *Weathers v. Barksdale*, 30 Ga. 888; *State v. Grant*, 79 Mo. 113.

A woman may be asked on cross-examination if she is not a prostitute, if she does not object on the ground of not being required to criminate herself. *State v. Coella*, 3 Wash. 99.

<sup>45</sup> *State v. Bruce*, 24 Me. 71; *State v. Sater*, 8 Iowa, 420; *Elliott v. State*, 34 Neb. 48, 51 N. W. 315.

That the witness has been accused of petit larceny is not admissible. *Barton v. Morpheus*, 2 Dev. (N. Car.) 520.

<sup>46</sup> *Crane v. Thayer*, 18 Vt. 162.

<sup>47</sup> *Thayer v. Boyle*, 30 Me. 475; *Hoitt v. Moulton*, 21 N. H. 586; *Brindle v. McIlvaine*, 10 S. & R. (Pa.) 282.

ing the credit of a witness by evidence introduced by the opposite party, such evidence must go to his general character, and proof of specific acts of immorality is not competent, yet for the purpose of discrediting his testimony the witness (himself) may be asked upon cross-examination as to his specific acts.<sup>48</sup> And, in regard to other crimes, it is said that the cross-examiner in seeking to impair the credibility of a witness by proof of collateral crimes, should be confined to specific acts. He may ask the witness whether or not he committed the act, or whether he has been convicted thereof or imprisoned therefor, but the interrogatories should be so framed as to permit the witness to admit or deny the act itself. He should not, for impeachment purposes, be asked questions which simply suggest inferences.<sup>49</sup> In some of the same states in which it was held that the witness may be cross-examined as to specific acts of misconduct for the purpose of discrediting him, as well as elsewhere, there are authorities to the contrary.<sup>50</sup> The matter is, doubtless, much within the discretion of the court, and no general rule can be laid down to fit all cases, but we think that such a cross-examination should not, ordinarily, be permitted as to such collateral matters, although there may be cases in which they so clearly affect the credibility of the witness that it should be allowed within limits, or at least may be allowed in the discretion of the court.

**§ 979. Proof of bad reputation—Who competent impeaching witnesses—Time of reputation.**—A person is a competent impeaching witness to another's character for truth and veracity if he is acquainted with the general reputation of that person (in that regard) in the neighborhood in which he lives.<sup>51</sup> As to the length of time

<sup>48</sup> *Real v. The People*, 42 N. Y. p. 270, 280. To the same effect see *Carroll v. State*, 32 Tex. Cr. App. 431, 24 S. W. 100, 40 Am. St. 786. See, also, *South Bend v. Hardy*, 98 Ind. 577, 49 Am. R. 792; *People v. Turney*, 124 Mich. 542, 83 N. W. 273; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. R. 496; *People v. Noelke*, 94 N. Y. 137, 46 Am. R. 128. See 57 Cent. Law Jour. 143, 164, 184; post § 1005.

<sup>49</sup> *State v. Kent*, 5 N. Dak. 516, 541, 67 N. W. 1052.

<sup>50</sup> See *Pyle v. Piercy*, 122 Cal. 383,

55 Pac. 141; *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 985; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 30 N. E. 1001; *Kellogg v. McCabe*, 92 Tex. 199, 47 S. W. 520; *Gulf, &c. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Herod v. State* (Tex. Cr. App.), 56 S. W. 59; *Smith v. Brockett*, 69 Conn. 492, 38 Atl. 57.

<sup>51</sup> *State v. Burbee*, 65 Vt. 1, 19 L. R. A. 145; *State v. Meadows*, 18 W. Va. 658; *Clapp v. Engledow*, 72 Tex.

necessary for the impeaching witness to have been acquainted with such reputation of the witness sought to be impeached, and as to how near the time of trial such acquaintance must have existed, there is a conflict among the cases.<sup>52</sup> But, while it should be of

252; *Dave v. State*, 22 Ala. 23; *Johnson v. People*, 3 Hill (N. Y.) 178; *Keeley v. Proctor*, 41 N. H. 139; *Elam v. State*, 25 Ala. 53; *Crabtree v. Kile*, 21 Ill. 180; *Mark v. State*, 36 Miss. 77; *State v. Parks*, 3 Ired. (N. Car.) 296; *Marshall v. State*, 5 Tex. App. 273.

The impeaching testimony must be as to the general reputation of the witness; what two or three persons may have said is not competent. *Matthewson v. Burr*, 6 Neb. 312. See, also, *Sargent v. Wilson*, 59 N. H. 396; *Commonwealth v. Rogers*, 136 Mass. 158; *Pickens v. State*, 61 Miss. 563; *Taylor v. Ryan*, 15 Neb. 573; *Montgomery v. Cross-thwait*, 90 Ala. 553.

The general character of a witness at his place of business cannot ordinarily be shown by evidence of what rumor said of it before he came to that place. *Campbell v. State*, 23 Ala. 44.

Although a witness, called to prove the general reputation of another witness for truth, stated that he was acquainted with some of his neighbors, but not with all; that he lived twelve miles from him, and that he had never heard the witness's character called in question on that point, it was held that he was a competent witness to that point. *Hadjo v. Gooden*, 13 Ala. 718.

The question to the impeaching witness, "whether he is acquainted with the general reputation of the witness sought to be impeached among his friends, neighbors and

associates," is competent. *Crabtree v. Hagenbaugh*, 25 Ill. 214.

A witness, it has been held, may testify as to the reputation of a witness for truth and veracity, even though he never heard such reputation discussed. *First Nat. Bank v. Wolff*, 79 Cal. 69.

The inquiry need not be restricted to the reputation of the witness in the place of his present residence. *Coffelt v. State*, 19 Tex. App. 436.

"Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last-named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity. He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor indeed is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected." *Teese v. Huntingdon*, 23 How. (U. S.) 213.

<sup>52</sup> Eight years' acquaintance is sufficient. *Dupree v. State*, 33 Ala. 380.

a reasonably recent date,<sup>53</sup> it need not be confined to the exact time of the trial, and considerable latitude is allowed, in the discretion of the court, according to the circumstances of the particular case.<sup>54</sup> If the witness sought to be impeached has recently moved from one place to another, his reputation at both places within a reasonable time may usually be shown.<sup>55</sup> So, even though he has resided in a community only a few weeks, if he has acquired a reputation

See *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431; *Kelly v. State*, 61 Ala. 19; *Louisville, &c. R. Co. v. Richardson*, 66 Ind. 43; *Memphis, &c. Co. v. McCool*, 83 Ind. 392; *Holiday v. Cohen*, 34 Ark. 707; *Thurmond v. State*, 27 Tex. App. 347; *Pape v. Wright*, 116 Ind. 502; *Watkins v. State*, 82 Ga. 231; *Mynatt v. Hudson*, 66 Tex. 66.

A person who removed into the neighborhood of an impeached witness, about the time the latter left, is competent to testify to his general reputation in that neighborhood at that time. *Martin v. Martin*, 25 Ala. 201.

A witness testified that he knew a previous witness in the old country, and that said witness had resided in this country about five years. The question then asked, whether he knew his character for truth and veracity in the old country, was held improper. *Webber v. Hanke*, 4 Mich. 198.

A stranger sent by a party to the neighborhood of a witness to learn his character, will not be permitted to testify as to the result of his inquiries. *Reid v. Reid*, 17 N. J. Eq. 101.

The reputation of a witness at a distant place where he made a three months' visit cannot be shown to impeach him. *Waddingham v. Hulett*, 92 Mo. 528.

The limit of the time to which

the inquiry is restricted is within the discretion of the court. *Buse v. Page*, 32 Minn. 111.

The time to which the impeaching evidence referred was held too remote from the time of the trial in the following cases: *Rucker v. Beaty*, 3 Ind. 70; *Aurora v. Cobb*, 21 Ind. 492; *Abshire v. Mather*, 27 Ind. 381; *Chance v. Indianapolis, &c. Co.* 32 Ind. 472; *Rawles v. State*, 56 Ind. 433.

As to the rule where the witness is confined in prison, see *Sage v. State*, 127 Ind. 15, 26 N. E. 667.

<sup>53</sup> *McGuire v. Kenefick*, 111 Iowa, 147, 82 N. W. 485; *Shuster v. State*, 62 N. J. L. 521, 41 Atl. 70; *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222; *Miller v. Miller*, 181 Pa. St. 572, 41 Atl. 277; *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95.

<sup>54</sup> *Stratton v. State*, 45 Ind. 468; *Davis v. Commonwealth*, 95 Ky. 19, 23 S. W. 585, 44 Am. St. 201 (two years); *Norwood v. Andrews*, 71 Miss. 641, 16 So. 262; *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725; *Watkins v. State*, 82 Ga. 231, 8 S. E. 875, 14 Am. St. 155; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Hope v. West Chicago St. Ry. Co.* 82 Ill. App. 311; *Wagoner v. Wagoner* (Md.), 10 Atl. 221.

<sup>55</sup> *Hamilton v. People*, 29 Mich. 173. See, also, *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459.

there during such time, it may be shown;<sup>56</sup> and this is not limited to the commencement of the action, but may extend to the time of the trial.<sup>57</sup> The impeaching witness, however, in most jurisdictions, must know and speak from or as to the general reputation and not merely from his private opinion or personal knowledge.<sup>58</sup> But he need not always be personally acquainted with the witness sought to be impeached,<sup>59</sup> nor is he required to know what a majority of the neighbors think of such witness.<sup>60</sup>

**§ 980. Proof of bad reputation—What questions asked.**—The questions usually asked the witness are these: (1) Are you acquainted with the reputation of the witness for truth and veracity in the neighborhood in which he lives? (2) What is that reputation, good or bad?<sup>61</sup> In many jurisdictions they also permit the additional

<sup>56</sup> *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737.

<sup>57</sup> *Fisher v. Conway*, 21 Kans. 18, 30 Am. R. 419; *Dollner v. Luitz*, 84 N. Y. 669; *Fossett v. State* (Tex. Cr. App.), 55 S. W. 497.

<sup>58</sup> *Griffin v. State*, 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. 460; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Houston, &c. R. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204; *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. 17; *Kitteringham v. Dance*, 58 Iowa, 632, 12 N. W. 612; *Bucklin v. State*, 20 Ohio, 18; *Cowan v. Kinney*, 33 Ohio St. 422; *Savannah, &c. R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400. See, also, *Walton v. State*, 88 Ind. 9; *Indianapolis, &c. R. Co. v. Anthony*, 43 Ind. 183.

<sup>59</sup> *State v. Turner*, 36 S. Car. 534, 15 S. E. 602. But it has been held that a stranger who goes into the neighborhood for a short time, merely to make inquiries and get evidence of the reputation of the witness in order to testify, is incompetent. *Douglass v. Tousey*, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101.

See, however, *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422.

<sup>60</sup> *Robinson v. State*, 16 Fla. 835; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 79 Am. Dec. 324; *Dave v. State*, 22 Ala. 23; *State v. Turner*, 36 S. Car. 534, 15 S. E. 602.

<sup>61</sup> *Stokes v. State*, 18 Ga. 17; *People v. Mather*, 4 Wend. (N. Y.) 229; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Boyle v. Kreitzer*, 46 Pa. St. 465; *Henderson v. Hayne*, 2 Metc. (Ky.) 342; *Mobley v. Hamit*, 1 A. K. Marsh. (Ky.) 590; *Elam v. State*, 25 Ala. 53; *Holmes v. State*, 88 Ala. 26. See, also, *Kelley v. Proctor*, 41 N. H. 139; *State v. Parks*, 25 N. Car. 296; *Crabtree v. Hagenbaugh*, 25 Ill. 214, 29 Am. Dec. 324.

There are a great many cases which hold that the form of the questions is immaterial, provided the necessary facts are embodied.

The following form of questions has been held proper: "Are you acquainted with A's reputation for truth and veracity? If so, what is it?" *French v. Millard*, 2 Ohio St. 44; *Knodel v. Williamson*, 17 Wall. (U. S.) 586, where the court held

question: "Would you believe the witness on oath?"<sup>62</sup> This is be-

"reputation" and "character" to be synonymous as far as the purposes of the question is concerned. "Are you acquainted with the general character of the witness?" *Hancock v. Stephens*, 11 *Humph. (Tenn.)* 507. "Do you know the general character of A for truth and veracity in the county of Russell?" *Boswell v. Blackman*, 12 *Ga.* 591. "What is the general character for truth in that town?" *Woodman v. Churchill*, 51 *Me.* 112. "Do you know the general character of the witness for truth and veracity in the neighborhood in which he resides or recently resided?" *Longhome v. Commonwealth*, 76 *Va.* 1012. "Do you know the general reputation of Morss for truth and integrity, in the community in which he resides?" *Heath v. Scott*, 65 *Cal.* 548.

See *State v. Prater*, 26 *S. Car.* 198.

The following form of questions has been rejected: "In what estimation is the witness held in this neighborhood." *State v. O'Neale*, 4 *Ired. (N. Car.)* 88. "Did B. state to you that he regarded it no wrong to swear falsely against such a man as C?" *Wilder v. Peabody*, 21 *Hun (N. Y.)* 376. "Are you acquainted with the rumor and belief of the people about the witness?" *Pleasant v. State*, 15 *Ark.* 624. "Whether from the conduct and treatment of the community generally, towards the witness, you know enough about his general character to say what it is for truth and veracity?" *Bates v. Barber*, 4 *Cush. (Mass.)* 107.

In Massachusetts it has been held that the omission of the prelimi-

nary question as to whether the impeaching witness knows the reputation of the witness sought to be impeached, lies within the discretion of the trial judge. *Wetherbee v. Norris*, 103 *Mass.* 565.

The question: "Are you acquainted with the general moral character of M." is too broad. *Rawles v. State*, 56 *Ind.* 433.

The "neighborhood" is not necessarily confined to the particular locality where the witness resides, but is co-extensive with that occupied by those with whom he associates and frequently comes in contact. *Peters v. Bourneau*, 22 *Ill. App.* 177. See, also, *People v. Lyons*, 51 *Mich.* 215.

<sup>62</sup> *People v. Mather*, 4 *Wend. (N. Y.)* 257; *Chess v. Chess*, 1 *P. & W. (Pa.)* 32; *Boyle v. Kreitzer*, 46 *Pa. St.* 465; *Keator v. People*, 32 *Mich.* 484; *Stevens v. Irwin*, 12 *Cal.* 306; *Mawson v. Hartsink*, 4 *Esp.* 102; *State v. Boswell*, 2 *Dev. (N. Car.)* 211; *Eason v. Chapman*, 21 *Ill.* 33; *People v. Rector*, 19 *Wend. (N. Y.)* 569; *Knight v. House*, 29 *Md.* 194; *Wilson v. State*, 3 *Wis.* 798; *Ford v. Ford*, 7 *Humph. (Tenn.)* 92; *Hillis v. Wylie*, 26 *Ohio St.* 574; *Hamilton v. People*, 29 *Mich.* 173; *Kimmel v. Kimmel*, *N. S. & R. (Pa.)* 199; *Majors v. State*, 29 *Ark.* 112; *Benesch v. Waggner*, 12 *Colo.* 534; *Benesch v. Mitchelson*, 12 *Colo.* 539; *State v. Johnson*, 40 *Kans.* 266, 19 *Pac.* 749; *Ware v. State*, 36 *Tex. Cr. App.* 597, 38 *S. W.* 198. The statement of Greenleaf to the contrary is criticised and shown to be erroneous in *Hamilton v. People*, 29 *Mich.* 173.

"When the impeaching witness is asked whether or not he could

lieved to be the better rule, but it does not obtain in all jurisdictions.<sup>63</sup> If the impeaching witness answers to the first question that he does not know the reputation of the witness sought to be impeached, that is generally the end of the matter.<sup>64</sup> On cross-examination, the impeaching witness, who has testified as to the reputation of the witness sought to be impeached, may be questioned very fully as to the extent and sources of his knowledge on the subject.<sup>65</sup>

**§ 981. Impeachment by showing witness convicted of infamous crime—Method of proof.**—The fact that a witness has been convicted of an infamous crime may be shown to impeach his credibility.<sup>66</sup> At common law the conviction of an infamous crime made a person

believe the other on oath, he is more likely to give an answer suggested by his personal knowledge or prompted by his personal feelings, or his individual opinion, than when asked whether or not he is acquainted with the general reputation of the former witness for truth in the community where he lives. He may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath; or any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives or is best known, and that the impeaching witness must speak from general reputation or report, and not from his own private opinion." *Boone v. Weathered*, 23 Tex. 675; *S. P. Holbert v. State*, 9 Tex. App. 219; *Bluitt v. State*, 12 Tex. App. 39.

An impeaching witness need not necessarily be asked whether he would believe the witness sought to be impeached under oath. *Laclede Bank v. Keeler*, 109 Ill. 385.

<sup>66</sup> *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *State v. Miles*,

15 Wash. 534, 46 Pac. 1047; *Walton v. State*, 88 Ind. 9. See, also, *Cline v. State*, 51 Ark. 140, 10 S. W. 225; *State v. Rush*, 77 Mo. 519; *Willard v. Goodenough*, 30 Vt. 393.

<sup>64</sup> *Bogle v. Kreitzer*, 46 Pa. St. 465; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. 254, and authorities cited in first note to this section. But see *Wetherbee v. Norris*, 103 Mass. 565; *State v. Murphy*, 48 S. Car. 1, 25 S. E. 43.

<sup>65</sup> *People v. Annis*, 13 Mich. 511; *Nelson v. State*, 32 Fla. 244, 13 So. 361; *Sorrelle v. Craig*, 9 Ala. 534; *State v. Meadows*, 18 W. Va. 658; *State v. Merriman*, 34 S. Car. 16, 12 S. E. 619; *Bates v. Barber*, 4 Cush. (Mass.) 107; *Loner v. Winters*, 7 Cow. (N. Y.) 263.

<sup>66</sup> *Jeffersonville, &c. R. Co. v. Riley*, 39 Ind. 568; *Ellis v. State*, 152 Ind. 326, 52 N. E. 82; *Commonwealth v. Gorham*, 99 Mass. 420; *State v. Kelsoe*, 76 Mo. 505; *Commonwealth v. Hall*, 4 Allen (Mass.) 305; *Glenn v. Clore*, 42 Ind. 60; *People v. Chin Mook Sow*, 51 Cal. 597; *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *State v.*



incompetent to be a witness, but this has, by statute, been generally turned into an objection to credit merely.<sup>67</sup> Under a few of the statutes it is not necessary that the crime should be infamous, and both under statutes and at common law there is some difference of opinion as to just what crimes come within the rule,<sup>68</sup> but it is nearly everywhere held that the fact that the witness has been convicted of an infamous crime may be shown, however it may be as to other crimes. It is generally held that such fact must be shown by the record and judgment of conviction,<sup>69</sup> unless, as in many

Loehr, 93 Mo. 103; *State v. McGuire*, 15 R. I. 23; *People v. Rodrigo*, 69 Cal. 601; *Card v. Foot*, 57 Conn. 427, 18 Atl. 713; *Baltimore, &c. R. Co. v. Rambo*, 59 Fed. 75.

See *Dickinson v. Dustin*, 21 Mich. 561.

Conviction of a misdemeanor is not admissible in many jurisdictions. *People v. Carolan*, 71 Cal. 195; *State v. Taylor*, 98 Mo. 240, 11 S. W. 570.

On cross-examination, for the sake of affecting his credibility, a witness may be asked, whether at a previous time, in another county, his character had not been shown to be that of a hog-thief. *Baker v. Trotter*, 73 Ala. 277.

He cannot be impeached by the fact that he is under indictment. *Campbell v. State*, 23 Ala. 44; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Van Bokkelen v. Berdell*, 130 N. Y. 141.

A conviction of mere assaults and batteries does not legitimately affect his credibility. *State v. Huff*, 11 Nev. 17; *Kitteringham v. Dance*, 58 Iowa, 632. Neither does a mere arrest. *Brown v. People*, 8 Hun (N. Y.) 562; *Card v. Foot*, 57 Conn. 427.

<sup>67</sup> See *Gardner v. St. Louis, &c. R. Co.* 135 Mo. 90, 97, 36 S. W. 214; *Prior v. State*, 99 Ala. 196; *Logan v. United States*, 144 U. S. 263, 12

Sup. Ct. 617; *People v. Dorthy*, 46 N. Y. S. 970.

<sup>68</sup> Conviction of any crime is admissible in Massachusetts. *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586. See, also, *Helm v. State*, 67 Miss. 562, 7 So. 487; *State v. Sauer*, 42 Minn. 258, 44 N. W. 115. But generally a mere misdemeanor or crime not involving moral turpitude, cannot be shown. *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Smith*, 125 Mo. 2, 28 S. W. 181; *Coble v. State*, 31 Ohio St. 100 (violation of city ordinance); *State v. Huff*, 11 Nev. 17; *Langhorne v. Commonwealth*, 76 Va. 1012; *Preston v. State* (Tex. Cr. App.), 53 S. W. 127. In some states it must be a felony. *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *Young Men's Christian Assn. v. Rawlings*, 60 Neb. 377, 83 N. W. 175.

<sup>69</sup> *People v. Elster*, 5 Cr. Law Mag. 687; *State v. Damery*, 48 Me. 327; *McLaughlin v. Cowley*, 131 Mass. 70; *Campbell v. State*, 23 Ala. 44; *Anderson v. State*, 34 Ark. 257; *Johnson v. State*, 48 Ga. 116; *Fay v. Harlan*, 128 Mass. 244; *West v. Lynch*, 7 Daly (N. Y.) 245; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Peck v. Yorks*, 47 Barb. (N. Y.) 131; *In re Real*, 55 Barb. (N. Y.) 186; *Peck v. Chouteau*, 91 Mo. 138; *Commonwealth v. Sullivan*, 150 Mass.

jurisdictions, it may be shown by the cross-examination of the witness himself. Parol evidence of the fact will not be received.<sup>70</sup> The record is conclusive and the witness will not be heard to declare his innocence of the crime for which he was convicted.<sup>71</sup>

**§ 982. Whether witness may be asked if convicted of crime.—**

It has been held, in some jurisdictions, that it may be proved by the testimony of the witness himself that he has been convicted of an

315; *State v. Sauer*, 42 Minn. 258; *State v. Adamson*, 43 Minn. 196; *Baltimore, &c. R. Co. v. Rambo*, 59 Fed. 75; *Kirby v. People*, 123 Ill. 436, 15 N. E. 33; *Killian v. Georgia, &c. Co.* 97 Ga. 727, 25 S. E. 384.

There must be a record of conviction. "It is clearly not admissible to impeach a witness by proof or suggestion that he has been indicted for any offense." *Canada v. Curry*, 73 Ind. 246; *S. P. Oliver v. Pate*, 43 Ind. 132; *Smith v. Yaryan*, 69 Ind. 445.

It has been held that the record of conviction must be from a court of the state in which the witness is sought to be impeached. *Campbell v. State*, 23 Ala. 44; *Missouri, &c. R. Co. v. DeBord*, 21 Tex. Civ. App. 691, 53 S. W. 587; *Contra: Commonwealth v. Knapp*, 9 Pick. (Mass.) 496.

The mittimus under which a defendant was received into the prison and the prison records of his punishment are inadmissible to impeach him when called as a witness. *Bartholomew v. People*, 104 Ill. 601.

The record of conviction of being a common seller of intoxicating liquors, though it be twenty-seven years old, has been held admissible for purposes of impeachment. *State v. Farmer*, 84 Me. 437, 24 Atl. 985.

<sup>70</sup> (This case goes to the right to

ask the question on cross-examination, and this subject is discussed in a later section). *Farley v. State*, 57 Ind. 331; *United States v. Woods*, 4 Cranch (C. C.) 484; *Peck v. Yorks*, 47 Barb. (N. Y.) 131; *Hall v. Brown*, 30 Conn. 551; *Sims v. Sims*, 12 Hun (N. Y.) 231. But see *Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200. See *Boyle v. State*, 105 Ind. 469.

In *Newcomb v. Griswold*, 24 N. Y. 300, the court, in speaking of the admissibility of parol evidence to show that a witness has been convicted of a crime, said: "Of that fact there was higher evidence, if it was admissible at all. It would be no answer to say that the record of conviction for a misdemeanor was not admissible in any evidence for any purpose, if that were so. If the fact of conviction could be proved, the record was competent. The fact could not be made competent by proving it by inferior and secondary evidence."

So, where a witness was convicted of an infamous crime, proof of such conviction must be made, it is not sufficient to show by a prison record that he had served a term in the penitentiary. *Bartholomew v. People*, 104 Ill. 601.

Parol proof of conviction will be received if not objected to. *State v. Rockett*, 87 Mo. 666.

<sup>71</sup> *Commonwealth v. Gallagher*, 126 Mass. 54; *Gardner v. Barthol-*

infamous crime. The reason for this rule is stated in one case: "It would be productive of great injustice often, if, where a witness is produced, of whom the opposite party has before never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails and other prisons for crimes, if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps states, which for the purposes of the trial are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might, in some cases, wholly defeat the ends of justice."<sup>72</sup> It has been held, also, that this rule not only applies to an ordinary witness, but also to a defendant who takes the stand as his own witness. "It is urged that to prove by an ordinary witness criminal transactions in his past life has no effect other than to weaken the credibility of the witness, while to adopt the same course with a defendant not only weakens his credibility, but also tends to so prejudice him in the minds of the jury as to increase the probabilities of a verdict of guilty at their hands. But this same argument would preclude proof of any collateral crime, however relevant and pertinent to the issues in the case, because the prejudice arising from proof of the collateral crime would be just as great in one case as the other. But guarded as a defendant in a criminal case always should be, by the instructions of the court, and as he is by his constitutional privilege to refuse to answer any question when the question might tend to criminate him, and by the rule of law which makes his answers on collateral matters absolutely conclusive upon the opposite party, apprehension of injustice resulting from the enforcement of the rule has no sufficient warrant, and rests, indeed, almost exclusively in imagination. The contrary rule would present a temptation to commit perjury that few men with criminal instincts would resist."<sup>73</sup> The weight of authority seems to support this view that it is per-

omew, 40 Barb. (N. Y.) 325; State v. Watson, 65 Me. 74; Sims v. Sims, 12 Hun (N. Y.) 231.

The record is admissible even if the witness has been pardoned for the offense for which he was convicted. Baum v. Clause, 5 Hill (N. Y.) 196; Curtis v. Cochran, 50 N. H. 242.

<sup>72</sup> Real v. People, 42 N. Y. 270, 280.

<sup>73</sup> State v. Kent, 5 N. Dak. 516, 541, 67 N. W. 1052. See, also, Ellis v. State, 152 Ind. 326, 52 N. E. 82. But compare Lewis v. Territory (Ariz.), 60 Pac. 694.

missible, on cross-examination, to ask the witness if he has not been convicted of an infamous crime,<sup>74</sup> but it is held in a number of cases that such an examination is not proper.<sup>75</sup>

**§ 983. Witness may be asked if he has been in penitentiary.—**

A witness upon cross-examination may, in most jurisdictions, be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places.<sup>76</sup> Thus, a witness introduced by the accused, and who gave material testimony in his favor, was asked by the district attorney upon cross-examination whether he had not been in the penitentiary, and how long he had been there, and the question was held proper.<sup>77</sup> So, as already stated,

<sup>74</sup> *People v. Johnson*, 57 Cal. 571; *People v. Pulman*, 129 Cal. 258, 61 Pac. 961; *State v. March*, 1 Jones (N. Car.) 526; *People v. Chin Mook Sow*, 51 Cal. 597; *Real v. People*, 42 N. Y. 270; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *State v. Lawhorn*, 88 N. Car. 634; *Spiegel v. Hays*, 118 N. Y. 660; *State v. Miller*, 100 Mo. 606, 13 S. W. 1051; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *State v. Ekanger*, 8 N. Dak. 559, 80 N. W. 482; *State v. Pfefferle*, 36 Kans. 90, 12 Pac. 406; *Squiers v. State*, 42 Fla. 251, 27 So. 864; *State v. Elwood*, 17 R. I. 763, 24 Atl. 782; *Keaton v. State* (Tex. Cr. App.), 57 S. W. 1125; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Ellis v. State*, 152 Ind. 326, 52 N. E. 82. See *McLaughlin v. Cowley*, 131 Mass. 70.

The inquiry must at least be limited to actual indictments; proof of mere charges of crime is incompetent. *Hill v. State*, 91 Tenn. 521, 19 S. W. 674.

<sup>75</sup> *Marx v. Hilsendegen*, 46 Mich. 336, 9 N. W. 439; *Crapo v. People*, 15 Hun (N. Y.) 269; *Newcomb v. Griswold*, 24 N. Y. 298; *Langhorne v. Commonwealth*, 76 Va. 1012; *Smith v. Castles*, 1 Gray (Mass.) 108; *Ryan v. People*, 79 N. Y. 503; Wash-

ington v. State, 63 Ala. 189; *Hall v. Brown*, 30 Conn. 551; *Johnson v. State*, 48 Ga. 116.

It is error to require a witness on cross-examination to answer this question: "Were you not convicted of a felony in this state?" *State v. Brent*, 100 Mo. 531.

<sup>76</sup> *Real v. The People*, 42 N. Y. 270, 280; *Smith v. State*, 64 Md. 25; *Zanone v. State*, 97 Tenn. 101; *McLaughlin v. Mencke*, 80 Md. 83; *Leslie v. Commonwealth* (Ky.), 42 S. W. 1095; *Stevens v. Beach*, 12 Vt. 585; *Spiegel v. Hayes*, 118 N. Y. 660; *State v. Miller*, 100 Mo. 606, 622, 13 S. W. 1051; *State v. McCartey*, 17 Minn. 76; *State v. Hill*, 52 W. Va. 296, 43 S. E. 160; *Borrego v. Territory*, 8 N. Mex. 446, 481. Compare *State v. Slack*, 69 Vt. 486; *Emery v. State*, 101 Wis. 627, 648.

<sup>77</sup> *Real v. The People*, 42 N. Y. 270, 280. Even where it is held that the conviction of a crime can only be shown by the record, it has been held that the witness may be asked, on cross-examination, if he has not been in the penitentiary or jail, for the purpose of honestly discrediting him. *State v. Taylor*, 118 Mo. 153, 24 S. W. 449, and authorities cited.

the prevailing rule is that a witness may be asked as to whether he has been convicted, and of what.<sup>78</sup>

§ 984. **Whether witness may be asked as to arrests or indictments.**—Many of the cases hold that in a criminal case, where the defendant is a witness in his own behalf, he may be examined as to his arrests, convictions and charges of crime made against him,<sup>79</sup> and questions as to whether a witness has been indicted or arrested for a crime have often been permitted in other cases on cross-examination.<sup>80</sup> But in a number of cases the contrary view is taken.<sup>81</sup>

§ 985. **Impeachment of party's own witness—In general.**—Where a party calls and examines a witness in his own behalf, he cannot, after getting the testimony of the witness, attack his general reputation for truth and veracity.<sup>82</sup> He cannot, according to the

<sup>78</sup> *Perham v. Noel*, 20 N. Y. App. Div. 516; *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744; *State v. Probasco*, 46 Kans. 310, 26 Pac. 749; *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603; *People v. Noelke*, 94 N. Y. 137. Contra: *State v. Fisher*, 1 Penn. (Del.) 303. See *Charnock v. Merchant*, 82 L. T. R. 89; *Smith v. Palmer*, 6 Cush. (Mass.) 513. See ante § 982.

<sup>79</sup> *State v. Lawhorn*, 88 N. Car. 634; *Ellis v. State*, 152 Ind. 326, 52 N. E. 82; *Jones v. State* (Tex. Cr. App.), 71 S. W. 962; *State v. McCoy*, 109 La. 682, 33 So. 730; *Leland v. Kauth*, 47 Mich. 508; *People v. Cummins*, 47 Mich. 334; *State v. Kent*, 5 N. Dak. 576, 67 N. W. 1052; *Commonwealth v. Murray*, 13 Phila. (Pa.) 454; *People v. Larsen*, 10 Utah, 143, 37 Pac. 258. But compare *Canada v. Curry*, 73 Ind. 246.

The witness may be asked, for the purpose of discrediting him, if he has not been in the penitentiary, and was sent there from a certain county. *Lights v. State*, 21 Tex. App. 308.

<sup>80</sup> *Whitley v. State* (Tex. Cr. App.), 56 S. W. 69; *Lewis v. Bell* (Tex.

Civ. App.), 40 S. W. 747; *People v. Hite*, 8 Utah, 461, 33 Pac. 254; *Oxier v. United States*, 1 Ind. Ter. 85, 38 S. W. 331; *State v. Greenburg*, 59 Kans. 404, 53 Pac. 61; *Roberts v. Commonwealth* (Ky.), 20 S. W. 267; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. R. 496 (discretionary with courts). But see *Kruger v. Spachek*, 22 Tex. Civ. App. 307, 54 S. W. 295.

<sup>81</sup> *People v. Irving*, 95 N. Y. 541; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *State v. Conway*, 20 R. I. 270, 38 Atl. 656 (where indictment was non prossed); *State v. Brown*, 100 Ia. 50, 69 N. W. 277; *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200.

<sup>82</sup> *Griffin v. Wall*, 32 Ala. 149; *Winder v. Diffenderffer*, 2 Bland (Md.) 166; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564; *Fillmore v. Union, &c. R. Co.* 2 Wyo. Ter. 94; *Fairly v. Fairly*, 38 Miss. 280; *Rockwood v. Poundstone*, 38 Ill. 199; *Thom v. Moore*, 21 Iowa, 285; *Pollock v. Pollock*, 71 N. Y. 137; *Perry v. Massey*, 1 Bail. (S. Car.) 32; In

prevailing rule, except where it is otherwise provided by statute, prove by other witnesses that the witness testifying made statements out of court inconsistent with and contradictory to what he has stated during the trial.<sup>83</sup> The rule, however, is subject to some modifications and exceptions, at least in some jurisdictions.<sup>84</sup> Al-

re Mellen's Estate, 56 Hun (N. Y.) 553; Hilreth v. Aldrich, 15 R. I. 163; Tarsney v. Turner, 48 Fed. 818; Batchelder v. Batchelder, 139 Mass. 1; Cox v. Eayres, 55 Vt. 24; Bauskett v. Keitt, 22 S. Car. 187; U. S. Life Ins. Co. v. Kielgast, 26 Ill. App. 567; Blackwell v. Wright, 27 Neb. 269; Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Collins v. Hoehle, 99 Wis. 639, 75 N. W. 416.

In Coulter v. American, &c. Co. 56 N. Y. 585, the court, through Johnson, J., said: "I understand the rule in this state to be settled, that a party may not impeach, either by general evidence or by proof of contradictory statements out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact material in the cause, although the effect of that proof may be to discredit him, but he cannot adduce such a contradiction when it is only material as it bears upon his credibility."

If the plaintiff calls a witness but does not use him, and he is used by the defendant, the plaintiff may impeach his character. Bebee v. Tinker, 2 Root (Conn.) 160.

<sup>83</sup>Hurley v. State, 46 Ohio St. 320, 21 N. E. 645; Spaulding v. Chicago, &c. R. Co. 98 Ia. 205, 67 N. W. 227; Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334; Coulter v. American, &c. Co. 56 N. Y. 555; Nichols v. White, 85 N. Y. 531; Adams v. Wheeler, 97 Mass. 67; Stearns v. Mechanics' Bank, 53 Pa. St. 490; Moore v. Chi-

cago, &c. R. Co. 59 Miss. 243; Chamberlain v. Sands, 27 Me. 458; Commonwealth v. Starkweather, 10 Cush. (Mass.) 59. But see De Lisle v. Priestman, 1 Browne (Pa.) 176; White v. State, 10 Tex. App. 381; Champ v. Commonwealth, 2 Metc. (Ky.) 17; Graves v. Davenport, 50 Fed. 881; People v. Mitchell, 94 Cal. 550; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 40 Am. St. 349; State v. Bloor, 20 Mont. 514, 52 Pac. 611; State v. Bartmers, 33 Ore. 110, 54 Pac. 167, in most of which cases the evidence was held admitted on the ground of surprise. In some of the states it is provided by statute that where a witness gives prejudicial testimony the party calling him, who is surprised thereby, may impeach him by evidence of contradictory statements. Conway v. State, 118 Ind. 488; Blackburn v. Commonwealth, 12 Bush (Ky.) 181; Champ v. Commonwealth, 2 Metc. (Ky.) 17; Dear v. Knight, 1 Fost. & F. 433; Hemengway v. Garth, 51 Ala. 530; Commonwealth v. Donahoe, 133 Mass. 407.

Where the state is neither surprised nor prejudiced by the testimony of a witness called by it, it cannot contradict him by introducing evidence of contradictory statements made by him out of court. Rhodes v. State, 128 Ind. 189, 27 N. E. 866.

<sup>84</sup>See First Baptist Church v. Brooklyn, &c. Co. 23 How. Pr. (N. Y.) 448; Ray v. Metropolitan, &c. Co. 163 N. Y. 447, 51 N. E. 751;

though a party cannot discredit his own witness as to his general character for truth and veracity by a direct assault for that purpose, he may give evidence to contradict any important and material fact to which the witness has testified.<sup>85</sup> The party may show what the

*Smith v. Utesch*, 85 Ia. 381, 52 N. W. 343; *Hall v. Manson*, 99 Ia. 698, 68 N. W. 922 (may be so impeached when called by both parties, or by the impeaching party if not used). To latter point see, also, *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 70 Am. St. 466, 52 N. E. 1095. But compare *Story v. Saunders*, 8 Humph. (Tenn.) 663.

The party taking the deposition of a witness may contradict him when the deposition is introduced by the opposite party. *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068; *Cudworth v. South Carolina Ins. Co.* 4 Rich. (S. Car.) 416, 55 Am. Dec. 692; *Insurance Co. v. Tinney*, 73 Miss. 726, 19 So. 662.

<sup>85</sup> *Norwood v. Kenfield*, 30 Cal. 393; *Thorn v. Moore*, 21 Iowa, 285; *Gray v. Gray*, 3 Litt. (Ky.) 465; *Shelton v. Hampton*, 6 Ired. (N. Car.) 216; *Hall v. Houghton*, 37 Me. 411; *Brolley v. Lapham*, 13 Gray, 294; *Olmstead v. Winsted Bank*, 32 Conn. 278; *Seavy v. Dearborn*, 19 N. H. 351; *Shellinger v. Howell*, 8 N. J. L. 310, 383; *Winston v. Moseley*, 2 Stew. (Ala.) 137; *Hunt v. Fish*, 4 Barb. (N. Y.) 324; *People v. Skeehan*, 49 Barb. (N. Y.) 217; *Parsons v. Suydam*, 3 E. D. Smith (N. Y.) 276; *Stockton v. Demuth*, 7 Watts (Pa.) 39; *United States v. Watkins*, 3 Cranch (C. C.) 441; *Rockwood v. Poundstone*, 38 Ill. 199; *Burkhalter v. Edwards*, 16 Ga. 593; *Brown v. Osgood*, 25 Me. 505; *Bradford v. Bush*, 10 Ala. 386;

*Wolfe v. Hauver*, 1 Gill (Md.) 84; *Whitney v. Eastern R. Co.* 9 Allen (Mass.) 364; *Brown v. Wood*, 19 Mo. 475; *Swanscot Machine Co. v. Walker*, 22 N. H. 457; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301; *Farr v. Thompson*, 1 Cheves (S. Car.) 37; *Gibbs v. Huyler*, 41 N. Y. S. 190; *Warren v. Gabriel*, 51 Ala. 235; *Brooks v. Weeks*, 121 Mass. 433; *White v. State*, 10 Tex. App. 381; *Langford v. Jones*, 18 Ore. 307; *Helms v. Green*, 105 N. Car. 251; *McDonald v. Carson*, 94 N. Car. 497; *White v. State*, 87 Ala. 24; *Moffatt v. Tenney* (Colo.), 30 Pac. 348; *Thompson v. State*, 29 Tex. App. 208; *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. 334; *Hill v. Goode*, 18 Ind. 207; *Schnuer v. State*, 18 Ind. App. 226, 47 N. E. 843.

A party may contradict his own witness upon matter material to the issue, by showing inconsistent statements made at other times, having first called the witness' attention to such inconsistent statements. *Commonwealth v. Donahoe*, 133 Mass. 407.

The matter of impeaching one's own witness is very largely within the sound judicial discretion of the trial court; and a slight error in the matter, where the testimony adduced is of little importance will not justify a reversal. *St. Louis, &c. R. Co. v. Weaver*, 35 Kans. 412. See, also, *Miller v. Cook*, 127 Ind. 339, 26 N. E. 1072; *State v. Sorter*, 52 Kans. 531, 34 Pac. 1036.

truth is even if the evidence adduced in so doing does tend to contradict a witness called by him.<sup>86</sup>

**§ 986. Impeachment of party's own witness—Opposite party.—**

When one calls the opposite party as a witness, the testimony of such party stands largely on the same footing as that of any other witness of the party calling him, and he cannot be impeached<sup>87</sup> by evidence of other witnesses as to his veracity and reputation generally. But other evidence of material facts may be given by the party calling him, and, in some jurisdictions at least, cases might well arise in which evidence of inconsistent statements made by him outside of court would be admissible.<sup>88</sup>

**§ 987. Impeachment of party's own witness—Rule where necessity demands calling of witness.—**

When a party is under the absolute necessity of calling a certain person as a witness, as where such person is a subscribing witness to a written instrument, such as a will, for instance, the rule that a party cannot impeach his own witness does not apply, and it seems that such witness may be impeached to the same extent and in the same manner as if he had been called by the opposite party.<sup>89</sup> It has been held that a party may offer in evidence a bill of sale or other instrument in writing if it is a part of the transaction in question, and then may show

<sup>86</sup> *Spencer v. White*, 1 Ired. (N. Car.) 236; *Sewell v. Gardner*, 48 Md. 178; *Blackwell v. Wright*, 27 Neb. 269, 43 N. W. 116, 20 Am. St. 662; *Price v. Lederer*, 33 Mo. App. 426, and cases cited in last note, *supra*.

<sup>87</sup> See *Helms v. Green*, 105 N. Car. 251, 11 S. E. 470; *Spencer v. White*, 1 Ired. L. (N. Car.) 236; *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170; *Tarsney v. Turner*, 48 Fed. 818; *Bensberg v. Harris*, 46 Mo. App. 404; *Price v. Lederer*, 33 Mo. App. 426.

<sup>88</sup> See generally *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361; *Paxton v. Boyce*, 1 Tex. 317; *Hunt v. Coe*, 15 Iowa, 197; *Drennen v. Lindsey*, 15 Ark. 359; *Thorn v.*

*Moore*, 21 Iowa, 285; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154. See, also, *Craig v. Grant*, 6 Mich. 447. That there is no absolute estoppel, see *Phoenix Ins. Co. v. McArthur*, 116 Ala. 659, 22 So. 903, 67 Am. St. 154; *Webber v. Jackson*, 79 Mich. 175, 44 N. W. 591, 19 Am. St. 465; *Helms v. Green*, 105 N. Car. 251, 11 S. E. 470, 18 Am. St. 893; *Crocker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169.

<sup>89</sup> *Shorey v. Hussey*, 32 Me. 579; *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291, 46 Am. Dec. 53; *Dennett v. Dow*, 17 Me. 19; *Olinde v. Saizan*, 10 La. Ann. 153; *Hildreth v. Aldrich*, 15 R. I. 163; *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788; *Hill v. Goode*, 18 Ind. 207;



that the instrument had its inception in fraud, since written instruments are not witnesses within the general rule that a party cannot impeach his own witness.<sup>90</sup>

**§ 988. Where defendant testifies for himself.**—If a defendant testifies for himself his reputation for veracity may be impeached as might that of any other witness.<sup>91</sup> That is, he may be impeached by reputation as evidence of character, by conviction of crime and in other ordinary ways.<sup>92</sup> There is no reason why this rule should not apply to both parties in a civil action, and, as shown by the authorities cited below and elsewhere, it is applied in most jurisdictions, even to the defendant in a criminal prosecution. It may often happen, however, that the inconsistent statement of a party is of such a nature as to be competent as an admission or confession rather than merely as impeaching evidence.

**§ 989. Jury determines weight of impeaching testimony.**—The weight to be given to impeaching testimony, and the question as to whether an impeaching witness is to be believed rather than the witness impeached, are matters for the jury to determine.<sup>93</sup> If the

*Judy v. Johnson*, 16 Ind. 371; *Brown v. Bulkley*, 14 N. J. Eq. 294; *Harden v. Hays*, 9 Pa. St. 151; *Brown v. Bellows*, 4 Pick. (Mass.) 179. See *Hull v. State*, 93 Ind. 128. This is true as to impeachment by contradictory statements. See *Masachusetts and Pennsylvania* last above cited, and *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046; *People v. Case*, 105 Mich. 92, 62 N. W. 1017. And it has been so held as to proof of general character tending to discredit the witness and render him unworthy of belief. *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291, 46 Am. Dec. 53; *State v. Slack*, 69 Vt. 486, 38 Atl. 311.

<sup>90</sup> *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587. See *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

<sup>91</sup> *State v. Robertson*, 26 S. Car. 117; *Peck v. State*, 86 Tenn. 259;

*United States v. Smith*, 47 Fed. 501; *State v. Bulla*, 89 Mo. 595; *State v. Palmer*, 88 Mo. 568. See ante § 964, n

He may be impeached the same as other witnesses and is not entitled to notice of the state's intention. *State v. Teeter*, 69 Iowa, 717.

Two defendants jointly indicted having agreed to be tried jointly, with the right to testify in behalf of each other, may each be impeached as a witness for the other. *McGruder v. State*, 71 Ga. 864.

<sup>92</sup> *Root v. Hamilton*, 105 Mass. 23; *People v. Sears*, 119 Cal. 267; *People v. Conroy*, 153 N. Y. 174.

<sup>93</sup> *United States v. Hall*, 44 Fed. 864; *Pierce v. Selleck*, 18 Conn. 321; *Rundell v. La Fleur*, 6 Allen (Mass.) 480; *Sharp v. State*, 16 Ohio St. 218; *Jernigan v. Wainer*, 12 Tex. 189; *Addison v. State*, 48 Ala. 478; *Allis v. Leonard*, 58 N. Y. 288;

jury believe that he has been successfully impeached it is ordinarily within their province to entirely disregard his testimony, and the court will seldom, if ever, interfere with their determination of the matter.<sup>94</sup>

*Sims v. State*, 68 Ga. 486; *Reynolds v. Greenbaum*, 80 Ill. 416; *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Steeple v. Newton*, 7 Ore. 110.

"It is for the jury to give credit to the impeaching testimony, or the witness sought to be impeached, and to determine for itself whether to believe the one or the other." *Pierce v. State*, 53 Ga. 365, 369.

It is not true that a witness must be credited unless directly impeached, or contradicted. His manner, the improbability of his story, or his self-contradiction, may justify the jury in not believing him. *Burtus v. Tisdall*, 4 Barb. (N. Y.) 571; *French v. Millard*, 2 Ohio St. 44.

If one portion of a witness's testimony is contradicted, but it does not appear that the witness intentionally swore falsely, the rest of his testimony is not necessarily rendered unworthy of credit by such contradiction. *Brennan v. People*, 15 Ill. 511; *Giltner v. Gorham*, 4 McLean (U. S.) 402.

A jury is not bound to accept the opinions of an impeaching witness. *Spivey v. State*, 8 Ind. 405.

In *Spies v. People*, 122 Ill. 1, 3 Am. St. 426, the court, in speaking of the general subject of the impeachment of witness, and the weight that should be given impeaching testimony, said:

"The defense introduced nine witnesses, living in Chicago, for

the purpose of impeaching Gilmer. The prosecution introduced eight witnesses from Iowa, where Gilmer lived from 1870 to 1879, and ten witnesses from Chicago, where he lived from 1879 to 1886, to sustain his reputation for truth and veracity. Before a witness can say that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts: 1. The fact that the witness knows the reputation for truth and veracity among the man's neighbors. 2. The fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact. Where, as here, eighteen witnesses of standing and credibility swear that a man's reputation is good, while nine of equal standing and credibility swear that it is bad. The jury must determine for themselves whether they will believe the eighteen men or the nine men."

<sup>94</sup> *White v. New York, &c. R. Co.* 142 Ind. 648, 42 N. E. 456; *Harper v. State*, 101 Ind. 109; *Farmers', &c. Ass'n v. Rector*, 22 Ind. App. 101, 53 N. E. 297.

## CHAPTER XLVI.

### CORROBORATION.

Sec.	Sec.
990. Meaning of term.	995. Other witnesses may be called—Good character.
991. Corroboration—In general.	996. Corroborating evidence may be circumstantial.
992. Must be of matters material to the issue—Rule where witness is a party.	997. Discretion of court—Province of court and jury.
993. Letters and admissions of the impeaching party and impeached witness admissible.	998. Corroboration in cases of rape.
994. Conflict whether former consistent statements admissible.	999. Corroboration in various proceedings.
	1000. Corroboration as to an accomplice.

§ 990. **Meaning of term.**—To corroborate is to strengthen and add weight or credibility to a thing by additional and confirming facts or evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established.<sup>1</sup> “Corroborating evidence,” it is said in a comparatively recent case, “is such evidence as tends, in some degree, of its own strength and independently to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty

<sup>1</sup> State v. Guild, 10 N. J. L. 163, 192, 18 Am. Dec. 404.

to the allegation or issue which it supports, and such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."<sup>2</sup>

§ 991. **Corroboration—In general.**—A party may, of course, corroborate the testimony of a witness called by him by evidence establishing the same relevant facts as those to which the witness has testified.<sup>3</sup> But, as will hereafter be shown, there is a sharp conflict upon the question as to whether statements of the witness made out of court, consistent with those in court, may be given in evidence for the purpose of breaking or impairing the force of impeaching evidence. Where the corroboration is asked to be permitted upon the ground that the credibility of the witness has been assailed and for the sole purpose of sustaining it, the corroboration evidence is not competent unless the witness has been attacked.<sup>4</sup> Mere contradiction of one witness by another does not, ordinarily, warrant evidence of former statements of the witness, but such a contradiction does not preclude a party from offering evidence fortifying or confirming that of his own witness provided it is otherwise competent, and a witness who has been impeached on cross-examination by contradictory statements out of court, or the like, will usually be permitted to explain his testimony so as to support his credibility.<sup>5</sup>

§ 992. **Must be of matters material to the issue — Rule where**

<sup>2</sup> *Gildersleeve v. Atkinson*, 6 N. Mex. 250, 27 Pac. 477.

<sup>3</sup> *Outlaw v. Hurdle*, 1 Jones (N. Car.) 150; *Green v. Gould*, 3 Allen (Mass.) 465; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Lyles v. Lyles*, 1 Hill Eq. 77. See, also, *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Oyler v. Danloff*, 36 Ore. 357, 59 Pac. 474.

<sup>4</sup> *State v. Rorabacher*, 19 Iowa, 154; *Hamilton v. Conyers*, 28 Ga. 276; *Bryant v. Tidgewell*, 133 Mass. 86; *State v. Patrick*, 107 Mo. 147; *Builders' Supply Co. v. Cox*, 68 Conn. 380, 36 Atl. 797. See, also, *State v. Carter*, 51 La. Ann. 442, 25 So. 385; *Madden v. State*, 65 Miss. 176, 3 So. 328.

"When a witness has been im-

peached it is competent to give corroborative evidence, as that his character for truth, etc., is good, or that he has made the same statements on other occasions; but to permit this to be done, there must be an impeachment of the witness, either directly or indirectly." *Adams v. Greenwich Ins. Co.* 70 N. Y. 166.

<sup>5</sup> *Hoover v. Carey*, 86 Iowa, 494, 53 N. W. 415; *Anderson v. State*, 104 Ala. 83, 16 So. 108; *Henry v. State*, 107 Ala. 22, 19 So. 23; *State v. Bedard*, 65 Vt. 278, 26 Atl. 719; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129; *Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216.

**witness is a party.**—Corroborative evidence must usually be of some matter material to the issues presented by the case on trial.<sup>6</sup> And corroborative evidence of statements made by the witness on other occasions are usually considered merely in support of the credit of the witness rather than as independent evidence of the facts narrated.<sup>7</sup> It has also been held that the rule permitting such corroborative statements does not apply to a witness who is a party to the action, as his inconsistent statements are in the nature of admissions and original evidence, and to permit him to corroborate his evidence by proof of consistent statements made by himself would be to permit him to make evidence for himself and introduce self-serving declarations that would necessarily do much more than go to the question of his credibility.<sup>8</sup>

### § 993. Letters and admissions of impeaching party and im-

<sup>6</sup> *McClintock v. Whittemore*, 16 N. H. 268; *Wiggin v. Plumer*, 31 N. H. 251; *Frazer v. People*, 54 Barb. (N. Y.) 306; *Atwood v. Scott*, 99 Mass. 177; *People v. Schweitzer*, 23 Mich. 301; *Madden v. State*, 65 Miss. 176, 3 So. 328; *Owens v. State* (Miss.), 33 So. 719; *Henkle v. McClure*, 32 Ohio St. 202; *Cooper v. State*, 90 Ala. 641, 8 So. 821; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770.

On the trial of an indictment, an accomplice, on his cross-examination, stated that the magistrate before whom the preliminary examination took place had given his assurances that he should not be prosecuted if he would disclose all he knew of the transaction in question, and it was held that this statement was material to the issue; and that the testimony of the magistrate, corroborating this statement, was admissible in evidence to support the general credit of the accomplice. *Commonwealth v. Bosworth*, 22 Pick. (Mass.) 397.

"A witness, who has given testi-

mony of the occurrence of any event at a particular period, the time of which is material, can strengthen his evidence by proving that it happened at the same time with, or before, or after, a particular epoch or transaction, the date of which can be proved with greater certainty." *Goodhand v. Benton*, 6 Gill & J. (Md.) 481.

To restore the credit of impeached witnesses, much depends on the nature as well as the extent of the corroboration. Such credit is restored to a much greater extent when the witness is corroborated as to the main fact than as to immaterial facts. *Haynes v. State*, 17 Ga. 465.

<sup>7</sup> *Thompson v. State*, 38 Ind. 39.

<sup>8</sup> *Logansport, &c. Tp. v. Heil*, 118 Ind. 135, 20 N. E. 703; *Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675. See, also, *Cooper v. State*, 90 Ala. 641, 8 So. 821; *State v. Kent*, 5 N. Dak. 576, 67 N. W. 1052; *Gabrielsky v. State*, 13 Tex. App. 428; *State v. Lenihan*, 88 Iowa, 670, 56 N. W. 292.

**peached witness admissible.**—Letters or admissions of the party impeaching the witness to the effect that the witness is truthful and held in high esteem for truth and veracity have been held admissible to corroborate the witness.<sup>9</sup> So, letters and written statements of the witness, although not in evidence, if shown to have been true at the time they were written, have been held admissible in evidence to corroborate the witness.<sup>10</sup> So, also, oral statements of the witness, as well as other facts co-existent with the facts in regard to which he testifies, are often admissible in corroboration.<sup>11</sup>

**§ 994. Conflict whether former consistent statements admissible.**

—The authorities are, as has been said, in conflict as to whether former consistent statements of a witness can be shown in corroboration of his testimony on the witness stand. There are a great number of cases holding that after the witness has been impeached, proof of such statements is admissible.<sup>12</sup> But there are perhaps an

<sup>9</sup> *Soules v. Burton*, 36 Vt. 652; *Stacy v. Graham*, 14 N. Y. 492. A written protest, made by a captain and crew on the morning after a collision, which corresponds with their statements in court, has been held competent evidence to sustain the credit of the captain, impeached by proof of his having made different statements. *The Pacific*, 1 Newb. (U. S.) 8.

<sup>10</sup> *Insurance Co. v. Weider*, 14 Wall. (U. S.) 375; *Driggs v. Smith*, 45 How. Pr. (N. Y.) 447; *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55; *Little v. Ratliff*, 126 N. Car. 262, 35 S. E. 469. See, also, *Hester v. Commonwealth*, 85 Pa. St. 139; *Rittenhouse v. Wilmington, &c. Co.* 120 N. Car. 544, 26 S. E. 922.

Where a witness was impeached, who swore that the plaintiff had agreed to give him credit for \$30, held that the books of the plaintiff were admissible as evidence, in corroboration of the witness, to show that the credit was given. *Fain v. Edwards*, Busb. (N. Car.) 64.

A deed given by the defendant in ejectment, after the commencement of the suit is admissible to support a witness whose testimony had been impeached. *Richardson v. Stewart*, 4 Binn. (Pa.) 198.

<sup>11</sup> *Myre v. Ludwig*, 1 Pa. St. 47.

It is always permissible to strengthen a witness's testimony by connected incidents showing its consistency and reasonableness. *Bruton v. State*, 21 Tex. 337.

<sup>12</sup> *United States v. Neversen*, 1 Mack (U. S.) 152; *Haley v. State*, 63 Ala. 83; *Perkins v. State*, 4 Ind. 222; *Dodd v. Moore*, 92 Ind. 397; *Cooke v. Curtis*, 6 Har. & J. (Md.) 93; *People v. Rector*, 19 Wend. (N. Y.) 569; *Bailey v. State*, 9 Tex. App. 98; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Dailey v. State*, 28 Ind. 285; *March v. Harrell*, 1 Jones (N. Car.) 329; *Dorsett v. Miller*, 3 Sneed (Tenn.) 72; *State v. Grant*, 79 Mo. 113; *Henderson v. State*, 70 Ala. 29; *Brookbank v. State*, 55 Ind. 169; *State v. Petty*, 21 Kans. 54; *Jackson v. Etz*, 5 Cow. (N. Y.)

equal number which hold that they are not admissible.<sup>13</sup> It would seem, at all events, that when no attempt at impeachment has been made, the former consistent statements should not be received in corroboration.<sup>14</sup>

Where, however, the prior consistent statements of a witness are charged to have been made when the witness was biased or interested, or under such circumstances as would prompt him to make a false statement, the party seeking to corroborate the witness may show that he made such consistent statements at times when he was under no influence that would lead him to mistake or misrepresent the facts.<sup>15</sup> If a witness wilfully swears falsely in one particular, the

314; *Henderson v. Jones*, 10 S. & R. (Pa.) 322; *State v. Dennin*, 32 Vt. 158; *Beauchamp v. State*, 6 Blackf. (Ind.) 300; *Johnson v. Patterson*, 2 Hawks. (N. Car.) 183; *Ratliff v. Ratliff*, 131 N. Car. 425, 42 S. E. 887; *Dailey v. State*, 28 Ind. 285; *French v. Merrill*, 6 N. H. 465; *State v. Dove*, 10 Ired. (N. Car.) 469; *State v. Ward*, 103 N. Car. 419; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019; *Craig v. State*, 30 Tex. App. 619; *Graham v. McReynolds*, 90 Tenn. 673.

Proof of a witness's statements before the grand jury is admissible to support his testimony at the trial. *Perkins v. State*, 4 Ind. 222.

<sup>13</sup> *United States v. Holmes*, 1 Cliff. (U. S.) 98; *Riney v. Vanlandingham*, 9 Mo. 816; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *People v. Finnegan*, 1 Park. Cr. R. (N. Y.) 147; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Smith v. Morgan*, 38 Me. 468; *State v. Vincent*, 24 Iowa, 570; *Commonwealth v. Jenkins*, 10 Gray (Mass.) 485; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Reed v. Spaulding*, 42 N. H. 114; *Conrad v. Griffey*, 11 How. (U. S.) 480; *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Nichols v.*

*Stewart*, 20 Ala. 358; *Munson v. Hastings*, 12 Vt. 348; *Dufresne v. Weise*, 46 Wis. 290; *EMicott v. Pearl*, 1 McLean (U. S.) 206; *Ware v. Ware*, 8 Me. 42; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *Powers v. Cary*, 64 Me. 10; *Deshon v. Merchants' Ins. Co.* 11 Met. (Mass.) 199; *Gibbs v. Linsley*, 13 Vt. 208; *Logansport, &c. Co. v. Heil*, 118 Ind. 135, 20 N. E. 703; *Marx v. Leinkauff*, 93 Ala. 453, 9 So. 818.

The declarations of a witness, when not under oath, are not admissible to corroborate his testimony under oath. *Riney v. Vanlandingham*, 9 Mo. 816.

<sup>14</sup> *Logansport, &c. Co. v. Heil*, 118 Ind. 135, 20 N. E. 703; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *Munson v. Hastings*, 12 Vt. 346, 36 Am. Dec. 345; *Atlanta, &c. R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864; *Morton v. State* (Tex. Cr. App.), 71 S. W. 281. But see *Lutterell v. Reynell*, 1 Mod. 282; *Burnett v. Wilmington, &c. R. Co.* 120 N. Car. 517, 26 S. E. 819.

<sup>15</sup> *Hayes v. Cheatham*, 6 Lea (Tenn.) 1; *Stewart v. People*, 23 Mich. 63; *Hester v. Commonwealth*, 85 Pa. St. 139; *State v. Hendricks*, 32 Kans. 559;

jury are warranted in believing him upon other particulars if corroborated.<sup>16</sup>

§ 995. **Other witnesses may be called—Good character.**—When the reputation of a witness for truth and veracity has been impeached, the party calling a witness has a right to call other witnesses to prove that such reputation is good.<sup>17</sup> Good character, it has

*State v. Thomas*, 3 *Strobh. Law* (S. Car.) 269; *French v. Merrill*, 6 N. H. 465; *People v. Doyell*, 48 Cal. 85; *Reed v. Spaulding*, 42 N. H. 114; *Commonwealth v. Jenkins*, 10 *Gray* (Mass.) 485; *Herrick v. Smith*, 13 *Hun* (N. Y.) 446; *Stolp v. Blair*, 68 *Ill.* 541; *Hotchkiss v. Germania, &c. Co.* 5 *Hun* (N. Y.) 91; *Baltimore, &c. R. Co. v. Knee*, 83 Md. 77, 34 *Atl.* 252; *State v. Flint*, 60 *Vt.* 304, 14 *Atl.* 178.

In a criminal prosecution the accused, to weaken the force of the evidence of certain witnesses who had testified to his identity with the criminal, introduced evidence tending to show that at a preliminary examination of himself, they testified less positively on that point; but it also appeared that the same witnesses, directly after the commission of the offence, asserted positively his identity with the person whom they saw commit the offence, and at the same time caused his arrest. Held, that such statements and action on the part of the witnesses, so near the time of the commission of the offence, tended to corroborate their testimony as to identity. *State v. Dennin*, 32 *Vt.* 158.

<sup>16</sup> *Brett v. Catlin*, 47 *Barb.* (N. Y.) 404; *Meixsell v. Williamson*, 35 *Ill.* 529. See, also, ante § 956.

But it has been said if a witness is shown to have wilfully and cor-

ruptly sworn falsely as to a leading fact, about which there could be no unintentional error, the mere fact that her evidence is corroborated in some other immaterial points will not restore her credibility. *Smith v. State*, 23 *Ga.* 297.

<sup>17</sup> *State v. Nelson*, 58 *Iowa*, 208; *Sloan v. Edwards*, 61 *Md.* 89; *People v. Rector*, 19 *Wend.* (N. Y.) 569; *George v. Pilcher*, 28 *Gratt.* (Va.) 299; *McCutchen v. McCutchen*, 9 *Port.* (Ala.) 650; *Clackner v. State*, 33 *Ind.* 412; *Prentiss v. Roberts*, 49 *Me.* 127; *Hamilton v. People*, 29 *Mich.* 173, 184; *Stape v. People*, 85 *N. Y.* 390; *Taylor v. Smith*, 16 *Ga.* 7; *Sweet v. Sherman*, 21 *Vt.* 23; *Diffenderfer v. Scott*, 5 *Ind. App.* 243, 32 *N. E.* 87.

An abortive attempt to impeach the character of a witness warrants the production of evidence of good character. *Com. v. Ingraham*, 7 *Gray* (Mass.) 46.

Impeaching witnesses may be corroborated by proof that their impeaching statements are true. *John v. State*, 16 *Ga.* 200.

Evidence tending to contradict a witness, and to show that he had conspired with one party to the action to cheat and defraud the other, does not authorize the introduction of evidence of the character of the witness for honesty and integrity. *Heywood v. Reed*, 4 *Gray* (Mass.) 574.

The reputation of the witness



been held, may be shown where the witness has been impeached by proof of conviction of crime.<sup>18</sup> But this principle is not always applied, at least where there is no real attack by way of impeachment.<sup>19</sup> If the witness has been impeached by proof that he made contradictory and inconsistent statements out of court, some of the cases allow his good character to be shown in corroboration,<sup>20</sup> while others refuse to admit such testimony.<sup>21</sup> However, to render testimony of good character competent and admissible in support of the witness, an attack must usually have been made on his character.<sup>22</sup>

cannot be sustained by people who, not being acquainted with it, say that they have never heard it assailed. *Magee v. People*, 139 Ill. 138, 28 N. E. 1077.

<sup>18</sup> *Gertz v. Fitchburg, &c. R. Co.* 137 Mass. 77; *Webb v. State*, 29 Ohio St. 351; *People v. Amanacus*, 50 Cal. 233.

<sup>19</sup> Testimony of a witness, upon cross-examination, that he had been tried for a crime in another state and acquitted, does not authorize the party calling him to introduce evidence of his general character for truth and integrity. *Harrington v. Lincoln*, 4 Gray (Mass.) 563. See, also, *Birmingham, &c. Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

<sup>20</sup> *Lewis v. State*, 35 Ala. 380; *Glaze v. Whitley*, 5 Ore. 164; *Paine v. Tilden*, 20 Vt. 554; *Hadjo v. Gooden*, 13 Ala. 718; *Haley v. State*, 63 Ala. 83; *Isler v. Dewey*, 71 N. Car. 14; *Burrell v. State*, 18 Tex. 713; *Sweet v. Sherman*, 21 Vt. 23; *Harris v. State*, 30 Ind. 131; *Difenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87; *Stratton v. State*, 45 Ind. 468; *Clark v. Bond*, 29 Ind. 555; *Paxton v. Dye*, 26 Ind. 393; *Tipton v. State*, 30 Tex. App. 530; *State v. Fruge*, 44 La. Ann. 165, 10 So. 621; *Fox v. Robbins* (Tex. Civ. App.), 70 S. W. 597.

"The statement of a witness on an immaterial point being contradicted by evidence, the party calling him may bring witnesses to testify to his general good character, although the opposite party disclaims the idea of discrediting him." *Newton v. Jackson*, 23 Ala. 335.

<sup>21</sup> *Chapman v. Cooley*, 12 Rich. (S. Car.) 654; *Webb v. State*, 29 Ohio St. 351; *Brown v. Mooers*, 6 Gray (Mass.) 451; *Vance v. Vance*, 2 Metc. (Ky.) 581; *Wertz v. May*, 21 Pa. St. 274; *Frost v. McCargar*, 29 Barb. (N. Y.) 617; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Stamper v. Griffin*, 12 Ga. 450; *Owens v. White*, 28 Ala. 413; *Webb v. State*, 29 Ohio St. 351, 357.

<sup>22</sup> *Braddee v. Brownfield*, 9 Watts (Pa.) 124; *Johnson v. State*, 21 Ind. 329; *Starks v. People*, 5 Den. (N. Y.) 106; *Wertz v. May*, 21 Pa. St. 274; *Rogers v. Moore*, 10 Conn. 13; *State v. Cooper*, 71 Mo. 436; *Brann v. Campbell*, 86 Ind. 516.

Though, by the general rule, a witness cannot be supported, by evidence of his general character as to truth, except after a general impeachment of it; yet where the witness is in the situation of a stranger, such evidence has been held admissible, without such pre-

Mere contradiction of some of his statements is not sufficient.<sup>23</sup> The witnesses called to sustain the general character of the witness for truth and veracity must, ordinarily, swear that they know it or they will not be heard.<sup>24</sup> But the fact that his neighbors say nothing about it may be some evidence that it is good.<sup>25</sup>

§ 996. **Corroborating evidence may be circumstantial.**—Even where the law requires corroboration of a confession or the testimony of a witness, the corroborative evidence may be circumstantial<sup>26</sup> as well as direct. Thus, it has even been held that the conduct of an accused when arrested,<sup>27</sup> or his demeanor on the stand,<sup>28</sup> may be such as to corroborate the prosecuting witness. But it is not every circumstance that will suffice, and merely showing that the

vious impeachment. *Merriam v. Hartford, &c. R. Co.* 20 Conn. 354.

Where the general moral character of a witness is impeached, on his own cross-examination, evidence may be introduced in support of his character for truth and veracity. *People v. Rector*, 19 Wend. (N. Y.) 569.

<sup>23</sup> *Brann v. Campbell*, 86 Ind. 516; *Pruitt v. Cox*, 21 Ind. 15; *State v. Ward*, 49 Conn. 429; *Owens v. White*, 28 Ala. 413; *Heywood v. Reed*, 4 Gray (Mass.) 514; *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

"It is well settled that a witness who is contradicted by evidence disproving the matters of fact testified to by him cannot call witnesses to prove good character." *Presser v. State*, 77 Ind. 274.

If the contradiction is limited to some particular point on which the witness testified proof of good character is admissible. *Davis v. State*, 38 Md. 15, 50.

<sup>24</sup> *Lyman v. Philadelphia*, 56 Pa. St. 488; *Cook v. Hunt*, 24 Ill. 535.

<sup>25</sup> They may give negative testimony that they never heard his reputation for truth and veracity

called in question. *State v. Lee*, 22 Minn. 407; *Davis v. Franke*, 33 Gratt. (Va.) 413; *State v. Nelson*, 58 Iowa, 208; *Morss v. Palmer*, 15 Pa. St. 51; *Conrad v. State*, 132 Ind. 254, 31 N. E. 805.

Where a witness called to sustain an impeached witness states on his direct examination that he has heard the character of the witness spoken against, the party calling him may ask the names of the persons referred to by him. *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

<sup>26</sup> *State v. Clough*, 111 Iowa, 714, 83 N. W. 727; *People v. Graner*, 42 N. Y. S. 721; *Galloway v. State*, 29 Ind. 442; *State v. Hawkins*, 115 N. Car. 712, 21 S. E. 623; *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976; *Montresser v. State*, 19 Tex. App. 281; *State v. Jean*, 42 La. Ann. 946, 8 So. 480; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; *Ryan v. State*, 100 Ala. 94, 14 So. 868.

<sup>27</sup> *Heard v. State*, 59 Miss. 545.

<sup>28</sup> *State v. Miller*, 24 W. Va. 802. See, also, *Webster v. Burke*, 24 La. Ann. 137; *Bessela v. Stern*, 46 L. J. C. 467, 2 C. P. D. 265.

accused had an opportunity to commit the offense is not ordinarily sufficient corroborative evidence to support a conviction where corroboration is required.<sup>29</sup>

**§ 997. Discretion of court—Province of court and jury.**—The court has power within reasonable bounds to limit and regulate the number of corroborating witnesses.<sup>30</sup> This general subject, however, is elsewhere considered.<sup>31</sup> So here, as elsewhere, the order in which the evidence shall be introduced is largely within the discretion of the court.<sup>32</sup> The question as to whether evidence is really of a corroborative character and admissible as such is for the court, but its weight is for the jury.<sup>33</sup>

**§ 998. Corroboration in cases of rape.**—In the trial of an indictment for rape the prosecutrix may be corroborated by proof that she made complaint, but, in most jurisdictions, the particulars of the complaint are not admissible,<sup>34</sup> unless she is impeached on the cross-examination; then the facts that she stated in the complaint

<sup>29</sup> *State v. Wheeler*, 116 Iowa, 212, 89 N. W. 978; *Murray v. State*, 43 Ga. 256. See, also, *Phillips v. Phillips*, 52 N. Y. S. 489. But compare *Crowder v. People*, 56 Ga. 44; *McClellan v. State*, 66 Wis. 335, 28 N. W. 347; *Commonwealth v. Tarr*, 4 Allen (Mass.) 315.

<sup>30</sup> *Bissell v. Cornell*, 24 Wend. (N. Y.) 354; *Bunnell v. Butler*, 23 Conn. 65.

On the trial of an action for seduction, the defendant who had testified in his own behalf offered evidence of good moral character, and the plaintiff having declared that he did not intend to offer any evidence to impeach the defendant's character, the court refused to allow more than three witnesses to testify on that subject for the defendant. It was held that the court was guilty of no abuse of discretion in so limiting the number of the defendant's witnesses. *Cox v. Pruitt*, 25 Ind. 90.

<sup>31</sup> See ante § 810.

<sup>32</sup> See *Green v. Gould*, 3 Allen (Mass.) 465; *State v. Mitchell*, 68 Ia. 116, 26 N. W. 44. But compare *Ryan v. State*, 100 Ala. 94, 14 So. 868; *State v. Labyer*, 4 Minn. 277.

<sup>33</sup> *Gildersleeve v. Atkinson*, 6 N. Mex. 250, 27 Pac. 477; *Winslow v. State*, 76 Ala. 42; *State v. Kiscock*, 111 Iowa, 690, 83 N. W. 724; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387.

<sup>34</sup> *Reg. v. Megson*, 9 Car. & P. 420; *Reg. v. Walker*, 2 Moo. & Rob. 212; *People v. McGee*, 1 Den. (N. Y.) 19; *Baccio v. People*, 41 N. Y. 265; *State v. Niles*, 47 Vt. 82; *State v. Richards*, 33 Iowa, 420; *State v. Ivins*, 7 Vr. (N. J.) 233; *Stephen v. State*, 11 Ga. 225.

The courts in some states admit the particulars of the complaint. *Burt v. State*, 23 Ohio St. 394; *State v. Kinney*, 44 Conn. 153. See, for conflicting authorities and statement of the rule, Vol. I, ch. xxv.

may, according to some of the cases, be admitted in corroboration of her testimony.<sup>35</sup> In the absence of some statutory provision requiring it, corroboration of the prosecutrix is not, ordinarily, necessary,<sup>36</sup> but it is required by statute in some states, and in a few jurisdictions it is held necessary even in the absence of any such statutory requirement.<sup>37</sup>

**§ 999. Corroboration in various proceedings.**—In application for divorce, in many jurisdictions, the rule requires some corroboration of the plaintiff's testimony before the decree of divorce will be granted.<sup>38</sup> In bastardy proceedings, unless required by statute, the

<sup>35</sup> *Thompson v. State*, 38 Ind. 39.

The promptness with which the prosecutrix in a case of rape makes complaint may be shown to corroborate her. *Laughlin v. State*, 18 Ohio, 99.

"Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is and can be no particular time specified. The rule is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female. But if instead of doing this she conceal the injury for any considerable time, it naturally excites suspicion of fraud, and tends to discredit her." *Higgins v. People*, 58 N. Y. 377. See, also, *Pleasant v. State*, 15 Ark. 624; *State v. Laxton*, 78 N. Car. 564.

<sup>36</sup> *Barnett v. State*, 83 Ala. 40, 3 So. 612; *Bond v. State*, 63 Ark. 504, 39 S. W. 554, 58 Am. St. 129; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *State v. Lattin*, 29 Conn. 389; *Doyle v. State*, 39 Fla. 155, 22 So. 272, 63 Am. St. 159; *Johnson v. People*, 197 Ill. 48, 64 N. E. 286; *People v. Miller*, 96 Mich. 119, 55 N. W. 675; *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *State v. Tuttle*, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. 689; *Givens v. Commonwealth*, 29 Gratt. (Va.) 830; *Lauphere v. State*, 114 Wis. 193, 89 N. W. 128.

<sup>37</sup> *Mathews v. State*, 19 Neb. 330, 27 N. W. 234; *Mares v. Territory*, 10 N. Mex. 770, 65 Pac. 165; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257; *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805 (statute).

<sup>38</sup> *Berdell v. Berdell*, 80 Ill. 604; *Tate v. Tate*, 26 N. J. Eq. 55; *Robbins v. Robbins*, 100 Mass. 150; *Scarborough v. Scarborough*, 54 Ark. 20, 14 S. W. 1098; *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *Clark v. Clark*, 86 Minn. 249, 90 N. W. 390; *Evans v. Evans*, 1 Rob. Eccl. 165. Contra: *Flattery v. Flattery*, 88 Pa. St. 27. See, also, *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912.

relatrix need not be corroborated,<sup>39</sup> unless she be impeached.<sup>40</sup> In an action by a parent or husband for the seduction of a daughter or wife, where the defendant impeaches the character of the daughter or wife, it has been held that proof of good character will be received in corroboration.<sup>41</sup> So, in actions for breach of promise, corroboration of the prosecuting witness has been held permissible after impeachment,<sup>42</sup> but corroboration is not, ordinarily, required.<sup>43</sup> While, as a general rule, in civil cases the issue of the case may be determined on the uncorroborated testimony of a single witness, yet there are cases which hold that such testimony is insufficient<sup>44</sup> in certain actions or as to certain issues. There are also other instances in which, in many jurisdictions, there must be corroborative

Even if the defendant confess the allegations of the complaint, such confession, it has been held, must be corroborated to warrant the granting of a decree. *Summerbell v. Summerbell*, 10 Stew. (N. J.) 603; *Lyon v. Lyon*, 63 Barb. (N. Y.) 138; *Evans v. Evans*, 41 Cal. 103.

<sup>39</sup> *State v. McGlothlen*, 56 Iowa, 545, 9 N. W. 893; *State v. Sullivan*, 12 R. I. 212; *State v. Nichols*, 29 Minn. 357; *Semon v. People*, 42 Mich. 141; *State v. Tipton*, 15 Mont. 74, 38 Pac. 222.

<sup>40</sup> *Judson v. Blanchard*, 4 Conn. 557; *People v. White*, 53 Mich. 537, 19 N. W. 174; *Sweet v. Sherman*, 21 Vt. 23; *McClellan v. State*, 66 Wis. 335, 28 N. W. 347. See, also, *Ramey v. State*, 127 Ind. 243, 26 N. E. 818.

<sup>41</sup> *Pratt v. Andrews*, 4 N. Y. 493; *Dodd v. Norris*, 3 Campb. 519. But corroboration is not usually an absolute requisite either in a civil action or criminal prosecution for seduction, in the absence of a statutory requirement. In many jurisdictions, however, under the statute, to warrant conviction or a verdict against the defendant the party against whom the wrong is committed usually has to be cor-

roborated in some way. *Armstrong v. People*, 70 N. Y. 38; *Merritt v. State*, 10 Tex. App. 402; *Harte v. State*, 172 Ala. 183, 23 So. 43; *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *State v. Richards*, 72 Ia. 17, 33 N. W. 342.

The defendant, it has been held, may, as an element of his defense, show that the character of the female for chastity is not good. *Commonwealth v. Gray*, 129 Mass. 474.

<sup>42</sup> *Wells v. Padgett*, 8 Barb. (N. Y.) 323; *Wightman v. Coates*, 15 Mass. 1; *Southard v. Rexford*, 6 Cow. (N. Y.) 254.

<sup>43</sup> *Lowden v. Morrison*, 36 Ill. App. 495; *Giese v. Schultz*, 65 Wis. 487, 27 N. W. 353; *Kelly v. Brennan*, 18 R. I. 41, 25 Atl. 346; *Nearring v. Van Fleet*, 71 Hun, 137, 24 N. Y. S. 531.

<sup>44</sup> *Powell v. Swan*, 5 Dana (Ky.) 1; *Collins v. McElroy*, 15 La. Ann. 639; *Brady v. McWilliams*, 19 La. Ann. 433; *Benedict v. Horner*, 13 Wis. 256; *Shearman v. Hart*, 14 Abb. Pr. (N. Y.) 358.

See *Hynson v. Texada*, 19 La. Ann. 470; *Field v. Harrison*, 20 La. Ann. 411.

In Louisiana it has been held that the evidence of one witness,

evidence to support a conviction for certain crimes, but they will be considered in another volume.

§ 1000. **Corroboration as to an accomplice.**—Where a witness, who is an accomplice of a defendant on trial for a crime, testifies against the defendant, there is some question as to whether on his testimony alone, without any corroboration whatever, a conviction can be based. Under the common law rule a conviction could be based on the unsupported testimony of an accomplice.<sup>45</sup> This rule prevails in some of the jurisdictions of the United States, and is almost universally recognized as the old common law rule.<sup>46</sup> Under

without corroborating circumstances, is not sufficient to establish an item in account of over \$500, for amount of a draft paid by the merchant which is alleged to be lost or mislaid. *Sierau v. Keenan*, 14 La. Ann. 705. But in another case it is held that one witness is sufficient to prove the payment or extinguishment of an obligation, exceeding in amount or value \$500, without the aid of corroborating circumstances, although his testimony, per se, would not be sufficient to prove a contract not reduced to writing, for the payment of money not exceeding that amount. *Jones v. Fleming*, 15 La. Ann. 522; *St. Romes v. New Orleans*, 18 La. Ann. 210. The uncontradicted evidence of a witness corroborated by the commercial books of the opposite party is sufficient proof to establish the correctness of a claim above \$500. *Goldsmith v. Friedlander*, 20 La. Ann. 119.

<sup>45</sup> *Reg. v. Barnard*, 1 Car. & P. 87; *Reg. v. Hastings*, 7 Car. & P. 152; *Reg. v. Atwood*, Leach C. C. 521; *Reg. v. Dawber*, 3 Stark. 34; *Reg. v. Jones*, 2 Campb. 132; *Reg. v. Boyes*, 1 B. & S. 311, 101 Eng. C. L. 309.

<sup>46</sup> *United States v. Bicksler*, 1 Mack (D. C.) 341; *State v. Stebbins*, 29 Conn. 463; *Sumpter v. State*, 11 Fla. 247; *State v. Williamson*, 42 Conn. 261; *State v. Watson*, 31 Mo. 361; *United States v. Neverson*, 1 Mack (D. C.) 152; *Commonwealth v. Holmes*, 127 Mass. 424, 34 Am. R. 391; *State v. Crab*, 121 Mo. 554, 26 S. W. 548; *Olive v. State*, 11 Neb. 1; *Stupe v. People*, 21 Hun (N. Y.) 399; *State v. Holland*, 83 N. Car. 624, 35 Am. R. 587; *State v. Potter*, 42 Vt. 495; *People v. Farrell*, 30 Cal. 316; *State v. Miller*, 97 N. Car. 484; *Ayres v. State*, 88 Ind. 275; *State v. Holland*, 83 N. Car. 624; *State v. Russell*, 33 La. Ann. 135; *Bowler v. Commonwealth*, 79 Ky. 604. See, also, *Campbell v. People*, 159 Ill. 9, 42 N. E. 123; *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560.

The testimony of an accomplice, while it should be corroborated, if possible, is to be considered by the jury for what it is worth. *United States v. Fleming*, 18 Fed. 907.

"It has been decided by this court, and we think correctly, that, while it is the duty of the court and jury to carefully scrutinize the testimony of an accomplice, yet a

the statutes of many of our states, however, corroboration of an accomplice is necessary to justify conviction.<sup>47</sup> And in many of the states where the common law rule still prevails to some extent, the courts have widely modified it, and may and do in their discretion advise a jury to acquit where the only evidence against a defendant is that of an uncorroborated accomplice.<sup>48</sup> Some of the

person may be convicted on the testimony of an accomplice alone, if his testimony shall be sufficiently satisfactory to the jury." *Johnson v. State*, 65 Ind. 269; *Ayres v. State*, 88 Ind. 275; *Stocking v. State*, 7 Ind. 326; *Ulmer v. State*, 14 Ind. 52.

It is not error to refuse to discharge the defendant in a criminal case at the close of the testimony for the prosecution, which is principally the evidence of an accomplice, when it is corroborated by other evidence, which at least tends to connect the defendant with the commission of the offence charged. *People v. Garnett*, 29 Cal. 622.

<sup>47</sup> *Zollicoffer v. State*, 16 Tex. App. 312; *Tisdale v. State*, 17 Tex. App. 444; *Lumpkin v. State*, 68 Ala. 56; *People v. Melvane*, 39 Cal. 614; *Johnson v. State*, 4 Greene (Iowa) 65; *People v. Courtney*, 28 Hun (N. Y.) 589; *Lopez v. State*, 34 Tex. 133; *Nourse v. State*, 2 Tex. App. 304; *Roach v. State*, 4 Tex. App. 46; *Powell v. State*, 15 Tex. App. 441; *State v. Howard*, 32 Vt. 380; *Marler v. State*, 67 Ala. 55; *People v. Ames*, 39 Cal. 403; *People v. Cloonan*, 50 Cal. 449; *Upton v. State*, 5 Iowa, 465; *Craft v. Commonwealth*, 80 Ky. 349; *People v. Ryland*, 28 Hun (N. Y.) 568; *Wright v. State*, 43 Tex. 170; *State v. Thornton*, 26 Iowa, 79; *People v. Ogle*, 104 N. Y. 511; *People v. Ev-*

*erhardt*, 104 N. Y. 591; *People v. Cleveland*, 49 Cal. 578; *Powell v. State*, 15 Tex. App. 441; *Kent v. State*, 64 Ark. 247; *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971.

Only enough corroboration to convince the jury that what the accomplice says is true is necessary. *State v. Dana*, 59 Vt. 614; *Woods v. State*, 76 Ala. 35; *State v. Hennessy*, 55 Iowa, 299.

In Alabama, under section 641 of the Penal Code, it is not necessary, in order to authorize a verdict of guilty on the testimony of an accomplice, that such testimony should be corroborated by other evidence in every material part. *Montgomery v. State*, 40 Ala. 684.

It is necessary that evidence corroborating an accomplice, in order to convict, should tend to connect the defendant with the commission of the offence, and not merely to show its commission or the circumstances of it. *State v. McKinzie*, 18 Iowa, 573; *State v. Willis*, 9 Iowa, 582.

There is no rule as to the amount of corroborating evidence necessary to warrant conviction on the testimony of an accomplice. *Bell v. State*, 73 Ga. 572.

<sup>48</sup> *Commonwealth v. Brooks*, 9 Gray (Mass.) 299; *Ingalls v. State*, 48 Wis. 647; *United States v. Bicksler*, 1 Mack (D. C.) 341; *Ray v. State*, 1 Greene (Iowa) 316; *Olive v. State*, 11 Neb. 1; *State v. Lowber*, 1 Houst. Cr. (Del.) 324;

cases hold that the rule that corroboration of an accomplice is necessary or that the jury should be cautioned, applies only to cases of felony and not to misdemeanors,<sup>49</sup> but others hold that there can be no valid reason for thus limiting the application of the rule.<sup>50</sup> The corroborating testimony, where required, must be on some point which tends to show that the defendant was directly connected with the commission of the offense for which he is on trial,<sup>51</sup> or of

*Cross v. People*, 47 Ill. 152; *State v. Howard*, 32 Vt. 380; *Solander v. People*, 2 Colo. 48; *State v. Maney*, 54 Conn. 178, 6 Atl. 401; *Parr v. State*, 36 Tex. Cr. App. 493, 38 S. W. 180.

In *Collins v. People*, 98 Ill. 584, 38 Am. R. 105, the court said: "The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant, as it is possible it could be satisfied from human testimony—and in such a case it would be an outrage upon the administration of justice to acquit."

The following instruction, as to the corroboration of an accomplice was held erroneous: "If you believe that the defendant, during the trial, knew that there were persons present who would contradict the witness, in a number of material statements in his testimony, if these were untrue, and defendant failed to call such witnesses for such purpose, such fact may be considered by you as tending to corroborate the witness." *State v. Hull*, 26 Iowa, 292. See, also, *Beattie v. Grand Trunk Co.* 41 Vt. 275.

<sup>49</sup> *Truss v. State*, 13 Lea (Tenn.) 311; *United States v. Harris*, 2 Bond (U. S.) 311; *Askea v. State*, 75 Ga. 356; *Wall v. State*, 75 Ga. 474; *McClery v. Wright*, 10 Irish L. 514. See also, *Reg. v. Farler*, 8 C. & P. 106.

<sup>50</sup> *Parsons v. State*, 43 Ga. 197; *State v. Davis*, 38 Ark. 581.

<sup>51</sup> *Ross v. State*, 74 Ala. 532; *Snoddy v. State*, 75 Ala. 23; *Marler v. State*, 67 Ala. 55; *People v. Ames*, 39 Cal. 403; *People v. Cloonan*, 50 Cal. 449; *State v. Willis*, 9 Iowa, 582; *State v. Thornton*, 26 Iowa, 79; *People v. Ryland*, 28 Hun (N. Y.), 568; *Wright v. State*, 43 Tex. 170; *Davis v. State*, 2 Tex. App. 588; *People v. Garnett*, 29 Cal. 622; *Ray v. State*, 1 Greene (Iowa) 316; *State v. McKenzie*, 18 Iowa, 573; *Commonwealth v. Holmes*, 127 Mass. 424; *Watson v. Commonwealth*, 95 Pa. St. 418; *State v. Ford*, 3 Strobb.



some material matter testified to by the accomplice,<sup>52</sup> corroboration on an immaterial or collateral matter is not sufficient.<sup>53</sup> The fact that the accomplice had given truthful testimony on matters entirely immaterial would afford no confirmation of his statements as to the main facts.<sup>54</sup> It is not necessary, however, that the matters in corroboration should cover every material fact.<sup>55</sup> As to those who are deemed accomplices within the rule as to corroboration of their testimony we refer to the authorities cited in the note below.<sup>56</sup>

(S. Car.) 517; *Commonwealth v. Hayes*, 140 Mass. 366; *Ford v. State*, 70 Ga. 722; *Welden v. State*, 10 Tex. App. 400; *Territory v. Mahaffey*, 3 Mont. 112; *Harper v. State*, 11 Tex. App. 1; *Childers v. State*, 52 Ga. 106; *Middleton v. State*, 52 Ga. 527; *Cohen v. State*, 11 Tex. App. 622; *State v. Lawler*, 28 Minn. 216; *State v. Clements*, 82 Minn. 434, 85 N. W. 229.

Under the Texas statute which required the corroborating testimony of an accomplice to "tend to connect the defendant with the offense committed," the following instruction, "In order to convict upon the testimony of an accomplice, there must be sufficient corroborating testimony of his guilt to satisfy your minds of the truth of the charge against him," was held not to conform to the statute. *Watson v. State*, 9 Tex. App. 237.

Confessions voluntarily made are sufficient to corroborate the testimony of an accomplice. *Partee v. State*, 67 Ga. 570.

<sup>52</sup> *State v. Schlagel*, 19 Iowa, 169; *State v. Hennessy*, 55 Iowa, 299; *Erb v. Commonwealth*, 98 Pa. St. 338; *People v. Lee*, 2 Utah, 441; *Montgomery v. State*, 40 Ala. 684; *Up-ton v. State*, 5 Iowa, 465; *Territory v. Corbett*, 3 Mont. 50; *State v. Howard*, 32 Vt. 380; *People v. Plath*, 100 N. Y. 590, 3 N. E. 790.

Where a pardoned convict has testified, in a criminal trial, to communications in the penitentiary between the prisoners at the bar and others, it was held proper to allow him to corroborate himself by evidence that he had shown visitors how communication between the cells was possible; and that no inducements had been held out to him to testify against the defendants. Such corroboration is admissible, although there had been no formal attempt to impeach him. *Howser v. Commonwealth*, 51 Pa. St. 332.

<sup>53</sup> *State v. Odell*, 8 Ore. 30; *Marler v. State*, 68 Ala. 580; *State v. Graff*, 47 Iowa, 384; *Harper v. State*, 11 Tex. App. 1; *Commonwealth v. Bosworth*, 22 Pick. (Mass.) 397; *Hughes v. State*, 58 Miss. 355; *McCalla v. State*, 66 Ga. 346.

<sup>54</sup> *Ray v. State*, 1 G. Greene (Iowa) 316, 48 Am. Dec. 379; *United States v. Howell*, 163 U. S. 690, 56 Fed. 21.

<sup>55</sup> *People v. Elliott*, 106 N. Y. 288; *Commonwealth v. Holmes*, 127 Mass. 424.

<sup>56</sup> *Anderson v. State*, 20 Tex. App. 312; *Stone v. State*, 3 Tex. App. 675; *Harris v. State*, 7 Lea (Tenn.) 124; *People v. Cook*, 5 Park. Cr. (N. Y.) 351; *People v. Farrel*, 30 Cal. 316; *State v. Hyer*, 39 N. J. L. 598; *English v. State*, 35 Ala. 428;

Persons who are cognizant of or even participants in wrong doing are not necessarily accomplices, the degree of their complicity determining their status.

*Rhodes v. State*, 11 Tex. App. 563; *Commonwealth v. Ford*, 111 Mass. 394; *Allen v. State*, 74 Ga. 769; *People v. Barric*, 49 Cal. 342; *State v. Reader*, 60 Iowa, 527.

A woman on whom an abortion is produced is not an accomplice. *Commonwealth v. Wood*, 11 Gray (Mass.) 85; *Dunn v. People*, 29 N. Y. 523; *Rex v. Hargrave*, 5 C. & P. 170; *Watson v. State*, 9 Tex. App. 239; *Commonwealth v. Boynton*, 116 Mass. 343; *People v. Vedder*, 98 N. Y. 630.

A woman with whom incest is committed is an accomplice. *Freeman v. State*, 11 Tex. App. 92, 40 Am. R. 782. In this case the court in speaking of whether the woman who was guilty of incest was an accomplice as to corroboration, said: "It would seem that in order to determine whether the witness in the present case was an accomplice or not, in the sense of requiring corroboration, the proper inquiry would be: did she knowingly, voluntarily, and with the same intent which actuated the defendant, unite with him in the commission of the crime charged against him. If she did, she was an accomplice, and her uncorrobo-

rated testimony would not support a conviction."

In subornation of perjury the person suborned and the person suborning are not accomplices. *United States v. Thompson*, 31 Fed. 331.

A person who, at a confined prisoner's request, conveys into the prison instrument to aid the prisoner in making an escape, is not an accomplice within the rule that a conviction cannot be had on the uncorroborated testimony of an accomplice. *Ash v. State*, 81 Ala. 76.

The jury may, in determining the credibility of a witness, regard him as an accomplice, without proof beyond a reasonable doubt. *Commonwealth v. Glover*, 111 Mass. 395.

One who was present at the commission of a homicide and for a time concealed the fact is not an accomplice with the party indicted for the offense. *Lowery v. State*, 72 Ga. 649.

A child only 13 years old, who, under coercion, assists in the commission of a felony, is not an accomplice within the meaning of the rule requiring corroboration. *People v. Miller*, 66 Cal. 468.

## CHAPTER XLVII.

### PRIVILEGES OF WITNESSES.

Sec.		Sec.	
1001.	Witness may refuse to criminate himself.	1009.	Effect claiming privilege has upon weight of testimony.
1002.	Illustrations of the rule.	1010.	Rule where statute of limitations has run against crime.
1003.	Evidence tending to criminate—Link in chain.	1011.	Rule where statutes protect.
1004.	Where answer exposes to liability of a civil action or of pecuniary loss.	1012.	Waiver of privilege—Refusal to answer.
1005.	Where answer tends to disgrace or render infamous.	1013.	Incriminating documents and articles—Unlawful searches and seizures.
1006.	Where answer tends to expose to a penalty or forfeiture.	1014.	Rule as to corporal inspection.
1007.	When privilege as to refusal to answer attaches—Privilege is personal.	1015.	Witness in court attendance protected from process.
1008.	Who determines whether answer tends to criminate.	1016.	Proceedings in which privilege is allowed.

§ 1001. **Witness may refuse to criminate himself.**—While a person is being examined in court as a witness he is allowed certain privileges, principal among which is his right to refuse to answer any question that would expose him to a penal liability or any kind of punishment.<sup>1</sup> This rule is derived from,

<sup>1</sup> See notes in 75 Am. St. 318-347, 21 Am. Dec. 55-62, 59 L. R. A. 465; Short v. State, 4 Harr. (Del.) 568; Richman v. State, 2 Greene (Iowa) 532; Rutherford v. Commonwealth,

2 Metc. (Ky.) 387; Coburn v. Odell, 10 Fost. (N. H.) 540; Bank of Salina v. Henry, 2 Den. (N. Y.) 155; United States v. Lynn, 2 Cranch (C. C.) 309; Stewart

and based on the old law that is expressed and embodied

v. Turner, 3 Edw. Ch. (N. Y.) 458; Poole v. Perritt, 1 Spears (S. Car.) 128; Cook v. Corn, 1 Overt. (Tenn.) 340; Lea v. Henderson, 1 Coldw. (Tenn.) 146; Marshall v. Riley, 7 Ga. 367; Robinson v. Neal, 5 T. B. Mon. (Ky.) 212; State v. Marshall, 36 Mo. 400; Janorin v. Scammon, 9 Fost. (N. H.) 280; United States v. Moses, 1 Cranch (C. C.) 170; United States v. Strother, 3 Cranch C. Ct. 432; Fries v. Brugler, 7 Hals. (N. J.) 79; People v. Mather, 4 Wend. (N. Y.) 229; Chamberlin v. Willson, 12 Vt. 491; State v. Edwards, 2 Nott & M. (S. Car.) 13; Lister v. Boker, 6 Blackf. (Ind.) 439; United States v. Craig, 4 Wash. (C. C.) 729; Southard v. Rexford, 6 Cow. (N. Y.) 255; People v. Herrick, 13 Johns. (N. Y.) 82; Cloyes v. Thayer, 3 Hill (N. Y.) 564; Low v. Mitchell, 18 Me. 372; Grannis v. Branden, 5 Day (Conn.) 260; Warner v. Lucas, 10 Ohio, 336; Poindexter v. Davis, 6 Gratt. (Va.) 481; People v. Kelly, 24 N. Y. 74; State v. Bilansky, 3 Minn. 246; State v. Olin, 23 Wis. 309; United States v. Darnaud, 3 Wall. Jr. (U. S.) 143, 179; Douglass v. Wood, 1 Swan (Tenn.) 393; Johnson v. Donaldson, 18 Blatchf. (C. C.) 287; Temple v. Commonwealth, 75 Va. 892; Muller v. State, 11 Lea (Tenn.) 18; Minters v. People, 139 Ill. 363, 29 N. E. 45; State v. Simmons, &c. Co. 109 (Mo.) 118, 15 L. R. A. 676, 18 S. W. 1125; Stevens v. State, 50 Kans. 712, 32 Pac. 350; Louisville, &c. Co. v. Hall, 91 Ala. 112, 24 Am. St. 863. In a prosecution for forgery it has been held that the person whose name is alleged to have been forged is not entitled to claim

the privilege of refusing to answer on the ground that his answer might criminate him. State v. Thaden, 43 Minn. 253; State v. Tall 43 Minn. 273.

An accomplice who takes the witness stand in behalf of the state, cannot, it has been held, refuse to answer any question relevant to the issue, on the ground that he cannot be required to criminate himself. Lockett v. State, 63 Ala. 5.

A witness cannot be compelled to answer as to any one act, the constant repetition of which would amount to a statutory offense. French v. Venneman, 14 Ind. 282.

It has also been held that when one of the parties becomes a witness in his own behalf he has the same privileges as any other witness. People v. Reinhart, 39 Cal. 449. See Brandon v. People, 42 N. Y. 265.

The purchaser of liquor sold in violation of law, does not, under ordinary circumstances, subject himself to any penalty, either at common law, as inducing the seller to commit a misdemeanor, or under the statute, and may therefore be compelled to testify as to such sale. Commonwealth v. Willard, 22 Pick. (Mass.) 476; Page v. State, 11 Lea (Tenn.) 202.

A witness, it has been held, is bound to testify, although he stands indicted for the same offense as the person on trial, and although he says his testimony will lead to his own conviction. State v. Douglass, 1 Mo. 527.

A witness cannot refuse to answer, because his answer might assist in pointing out sources of evi-

in the maxim, "Nemo tenetur seipsum accusare,"<sup>2</sup> but while it was, in England, "a mere rule of evidence," it has been "clothed in this country with the impregnability of a constitutional enactment."<sup>3</sup> Although a party becomes a witness in his own behalf, thereby subjecting himself to a cross-examination that might tend to convict him of the crime for which he is on trial, nevertheless he does not waive all protection, but still has a right to invoke his constitutional privilege of declining to answer questions as to collateral matters that are irrelevant and immaterial, the answers to which might criminate him. "In such a case," it is said, "the party taking the witness stand should have the same protection and immunity that is furnished any other witness. The law's solicitude that no innocent man be punished, and that every man accused of

dence to sustain a criminal suit against himself, of which otherwise the prosecuting officer could have had no knowledge. *People v. Kelly*, 24 N. Y. 74.

Under a statute which provides that each or any member of a company or corporation shall be liable to punishment if the company or corporation is found guilty of illegally selling liquor, it was held that, under an indictment of an incorporated club, a member could not be compelled to testify to facts tending to prove the club guilty. *Chesapeake Club v. State*, 63 Md. 446.

"It is an ancient maxim of the law that no man can be compelled to criminate himself—*nemo tenetur seipsum*. Neither can he be required to give testimony tending in that direction, or to disclose a single link in the chain of proof against him. This and kindred maxims, having for their object security to life, liberty and property, are so inwrought into the texture and fabric of the common law, as to cause it to breathe the spirit of justice and to become the exponent of an enlightened civilization. This principle is grafted

into our federal and state constitutions, and fortified by a long and uniform course of judicial decisions. It has its foundation in natural justice, and is analogous to the right of self-defense." Chief Justice Wade of Montana, in 2 Cr. L. Mag. 313; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195.

See 5 Cr. L. Mag. 182, where the Hon. S. D. Thompson attacks and condemns this maxim. He says: "But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it. The reasons which brought it into existence have passed away. It remains little more than a rogue's maxim. If a gang of thieves and counterfeiters were to meet together for the purpose of framing a code of laws for their own protection, this would be the first section of their code." See, also, 8 Law Notes, 261.

<sup>2</sup>*Brown v. Walker*, 161 U. S. 591, 597, 16 Sup. Ct. 644. But the rule is enforced even in the absence of a specific constitutional provision against compelling one accused of crime to give incriminating evidence against himself. *State v. Height*, 117 Iowa, 650, 91 N. W. 935.

crime be tried by a jury unswayed by prejudice or passion, furnishes ample excuse for the constant tendency in many courts to strengthen the protective armor of a defendant when on the witness stand. But exact justice is better served when his credibility receives the same protection that shields that of every witness who goes into the witness box, and nothing more."<sup>4</sup> In many states it is held that the accused who becomes a witness for himself may, on cross-examination, be asked any questions relevant to the issue.<sup>5</sup> In one case the rule is stated as follows: "When a defendant in a criminal case voluntarily takes the witness stand in his own behalf, he thereby subjects himself to the same rules of cross-examination that govern other witnesses, with the exception that his privileges are to some extent curtailed, in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense, when such other answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case."<sup>6</sup> In some states, however, where the range of cross-examination is not so wide, such a witness can only be cross-examined on the subject touched upon in his cross-examination, and it has even been said that "he is at liberty to stop at any point he chooses," although the jury may consider such action in determining what weight to give his testimony.<sup>7</sup> According to the prevailing rule, while an

<sup>4</sup> *State v. Kent*, 5 N. Dak. 516, 541, 67 N. W. 1052.

<sup>5</sup> *Commonwealth v. Tolliver*, 119 Mass. 312; *People v. Tice*, 131 N. Y. 651, 30 N. E. 494; *McC Campbell v. McC Campbell*, 103 Ky. 745, 46 S. W. 18.

<sup>6</sup> *State v. Kent*, 5 N. Dak. 516, 541, 67 N. W. 1052. See, also, *Connors v. People*, 50 N. Y. 240; *People v. Howard*, 73 Mich. 10, 40 N. W. 789; *Chambers v. People*, 105 Ill. 409; *McKeone v. People*, 6 Colo. 346; *State v. Wentworth*, 65 Me. 234; *Hanoff v. State*, 37 Ohio St. 180; *State v. Pfefferle*, 36 Kans. 90, 12 Pac. 406; *Thomas v. State*,

103 Ind. 419, 2 N. E. 808; *Boyle v. State*, 105 Ind. 469, 5 N. E. 203 (limited to general subject of examination in chief, but may go fully into that); *State v. Red*, 53 Iowa, 69, 4 N. W. 831; *Norris v. State*, 87 Ala. 85, 6 So. 371; *Rains v. State*, 88 Ala. 91, 7 So. 315; *State v. Duncan*, 7 Wash. 336, 38 Am. St. 888, 35 Pac. 117; *State v. Allen*, 107 N. Car. 805; *Guy v. State*, 90 Md. 29, 44 Atl. 997; *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189; *State v. Witham*, 72 Me. 531.

<sup>7</sup> *Cooley Const. Lim.* (6th ed.) 384. See, also, *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477; *State v.*

ordinary witness as well as the defendant who testifies for himself, may be cross-examined as to a matter, even though incriminating, if he has voluntarily gone into it in part in chief,<sup>8</sup> yet there seems to be this distinction as to matters not so gone into in chief, namely, the ordinary witness may stop and refuse to answer when he is first questioned as to incriminating matter not connected with the matter testified to in chief, even though he may have testified in chief to some other criminating act, so long as it is distinct from that on which he is sought to be cross-examined,<sup>9</sup> while a defendant who voluntarily becomes a witness for himself may with more reason be said to waive his privilege as to all matters material and relevant to the main issue.<sup>10</sup>

§ 1002. **Illustrations of the rule.**—The privilege has been claimed and allowed when the answer would tend to show the one on the witness stand guilty of any one of the following crimes: Arson,<sup>11</sup> conspiracy,<sup>12</sup> libel,<sup>13</sup> adultery,<sup>14</sup> larceny,<sup>15</sup> illegal voting<sup>16</sup> and misprision of treason.<sup>17</sup> So the privilege has been allowed where one was asked a question concerning an attempt on his part to improperly influence a juror,<sup>18</sup> and so where he was asked as to a fraudulent disposal of property.<sup>19</sup> It may also be noted in this connection that the privilege extends to examinations before the grand jury and the

Lurch, 12 Ore. 99, 6 Pac. 408; Gale v. People, 26 Mich. 158; Baehner v. State, 25 Ind. App. 597, 58 N. E. 741; and for statutory limitations see State v. Patterson, 88 Mo. 88, 57 Am. L. 374; People v. O'Brien, 96 Cal. 171; People v. Wong Ah Leong, 99 Cal. 440.

<sup>8</sup> Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189; Commonwealth v. Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; Ex parte Park, 37 Tex. Cr. App. 590, 40 S. W. 300, 66 Am. St. 835; Este v. Wilshire, 44 Ohio St. 636; People v. Freshour, 55 Cal. 375; Samuel v. People, 164 Ill. 379, 45 N. E. 728; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191. But see Georgia R. Co. v. Lybund, 99 Ga. 421, 27 S. F. 794.

<sup>9</sup> Evans v. O'Connor, 174 Mass.

287, 54 N. E. 557, 75 Am. St. 316; Low v. Mitchell, 18 Me. 372; Lombard v. Mayberry, 24 Neb. 674, 40 N. W. 271, 8 Am. St. 234.

<sup>10</sup> See State v. Ober, 52 N. H. 459, 13 Am. R. 88.

<sup>11</sup> Rex v. Pegler, 5 Car. & P. 521.

<sup>12</sup> People v. Mather, 4 Wend. 236, 21 Am. Dec. 122.

<sup>13</sup> Matter of Toppam, 9 How. Pr. (N. Y.) 394.

<sup>14</sup> Smith v. Smith, 116 N. Car. 386, 21 S. E. 196.

<sup>15</sup> Howell v. Com. 5 Gratt. (Va.) 664.

<sup>16</sup> State v. Olin, 23 Wis. 309.

<sup>17</sup> Burr Trial, 1 Rob. 207.

<sup>18</sup> Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143.

<sup>19</sup> Ex parte Clarke, 103 Cal. 352, 37 Pac. 230.

like, as well as to an examination in court upon the trial of the cause.<sup>20</sup>

§ 1003. **Evidence tending to criminate—Link in chain.**—It is not essential that the answer to the question would actually criminate the witness, but the privilege may be claimed if the answer would tend to criminate.<sup>21</sup> "The reason of this is that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him."<sup>22</sup> It is therefore held that he cannot be compelled to give an answer that would constitute even a single link in a chain of evidence which would convict him.<sup>23</sup>

§ 1004. **Where answer exposes to liability of a civil action or of pecuniary loss.**—The fact that the answer of the witness would expose him to liability to a civil action or pecuniary loss will not protect him from giving his testimony.<sup>24</sup> At the early common law this was a doubtful question, but it was settled in England by a statute which has generally been followed in this country as declaratory of the true doctrine of the common law.

<sup>20</sup> *State v. Lewis*, 96 Iowa, 286, 65 N. W. 295; *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *People v. Lander*, 82 Mich. 109, 46 N. W. 956; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195; *Eckstein's Appeal*, 148 Pa. St. 509, 24 Atl. 63; *Emery's Case*, 107 Mass. 172, 9 Am. R. 22.

<sup>21</sup> *Simmons v. Holster*, 13 Minn. 249; *People v. Forbes*, 143 N. Y. 219; *People v. Mather*, 4 Wend. (N. Y.) 230, 21 Am. Dec. 122; *Minter v. People*, 139 Ill. 363, 29 N. E. 45; *Eaton v. Farmer*, 46 N. H. 200; *Stevens v. State*, 50 Kans. 712, 32 N. W. 350; *Commonwealth v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326.

<sup>22</sup> *Rex v. Slaney*, 5 Car. & P. 213.

<sup>23</sup> *State v. Gardiner*, 88 Minn. 130, 92 N. W. 529; *Baehner v. State*, 25 Ind. App. 597, 602, 58 N. E. 741; *Printz v. Cheeney*, 11 Iowa, 469;

*Ford v. State*, 29 Ind. 541, 95 Am. Dec. 658; *State v. Simmons Hardware Co.* 109 Mo. 118, 18 S. W. 1125; *Burr's Trial*, 1 *Burr's Trial*, 244; *Higdon v. Heard*, 14 Ga. 255, and authorities cited in preceding notes to this section.

<sup>24</sup> *Commonwealth v. Thurston*, 7 J. J. Marsh. (Ky.) 62; *Taney v. Kemp*, 4 Har. & J. (Md.) 348; *Copp v. Upham*, 3 N. H. 159; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Milner v. Creyon*, 2 Brev. (S. Car.) 108; *Zollicoffer v. Turney*, 6 Yerg. (Tenn.) 297; *Gorham v. Carrol*, 3 Litt. (Ky.) 221; *Lowney v. Perham*, 20 Me. 235; *Harper v. Burrow*, 6 Ired. L. (N. Car.) 30; *Ward v. Sharp*, 15 Vt. 115; *Hays v. Richardson*, 1 Gill & J. (Md.) 336; *Conover v. Bell*, 6 T. B. Mon. (Ky.) 157; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *Alexander v. Knox*, 7



### § 1005. Where answer tends to disgrace or render infamous.

Where an answer to a question propounded to a witness would directly disgrace him or render him infamous, he cannot, in many jurisdictions, be compelled to answer, unless the evidence sought to be elicited is material to one of the issues presented by the cause.<sup>25</sup> Any question tending to degrade, disgrace or to render him infamous, and, apparently, put solely for that purpose, will generally be disallowed,<sup>26</sup> or at least he will not be compelled to answer where it is immaterial and irrelevant, although the cross-examination as to such matter is frequently said to be much within the discretion of the court, and, as elsewhere shown, questions as

Ala. 503; *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Judge of Probate v. Green*, 1 How. (Miss.) 146; *French v. Price*, 24 Pick. (Mass.) 13.

Contra: *Appleton v. Boyd*, 7 Mass. 131; *Starr v. Tracy*, 2 Root (Conn.) 528; *Webster v. Lee*, 5 Mass. 334; *Simons v. Payne*, 2 Root (Conn.) 406.

Compare: *Patton v. Brown*, *Cooke* (Tenn.) 126; *Bank of U. S. v. Washington*, 3 Cranch C. Ct. 295; *Tatum v. Lofton*, *Cooke* (Tenn.) 115.

The constitutional right to refuse to give evidence against one's self held not to refer to civil cases, but only to criminal cases, in *Keith v. Woombell*, 8 Pick. (Mass.) 217; *Devoll v. Brownell*, 5 Pick. (Mass.) 448.

<sup>25</sup> *State v. Staples*, 47 N. H. 113; *State v. Porter*, 52 W. Va. 132, 43 S. W. 230; *State v. Hill*, 52 W. Va. 296, 43 S. E. 160; *Lohman v. People*, 1 N. Y. 379; *Conway v. Clinton*, 1 Utah Ter. 215; *In re Lewis*, 39 How. Pr. (N. Y.) 155; *State v. Farmer*, 46 N. H. 200; *State v. Marshall*, 36 Mo. 400; *Taylor v. McIrwin*, 94 Ill. 488; *Close v. Olney*, 1 Den. (N. Y.) 319; *City of South Bend v. Hardy*, 98 Ind. 577; *Wilkins v. Malone*, 14 Ind. 153; *Tem-*

*ple v. Commonwealth*, 75 Va. 892; *Weldon v. Burch*, 12 Ill. 374; *Clementine v. State*, 14 Mo. 112; *Taylor v. Jennings*, 7 Robt. (N. Y.) 581; *Ex parte Rowe*, 7 Cal. 184; *Kendrick v. Commonwealth*, 78 Va. 490.

Where, on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and token by which horse thieves are known and recognized by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens. *State v. Wilson*, 8 Iowa, 408.

<sup>26</sup> *State v. Bailey*, 1 Penn. (N. J.) 396; *United States v. Dickinson*, 2 McLean (U. S.) 325; *Vaughn v. Perrine*, 3 N. J. L. 299; *Galbreath v. Eichelberger*, 3 Yeates (Pa.) 515; *Howe v. Commonwealth*, 5 Gratt. (Va.) 664; *Hayward v. People*, 96 Ill. 492.

It has been held that an unmarried woman may be asked, on cross-examination, although she has a right to refuse an answer, whether she has any children. *Campbell v. State*, 23 Ala. 44.

In one case where the witness who was a party was asked this question: "How many times have you been arrested?" the court held

to matters that disgrace a witness may be permitted in a number of jurisdictions on cross-examination for the purpose of impeaching or affecting the credibility of the witness, but in such cases the cross-examiner is generally held to be so far bound by the answer as to such an irrelevant and collateral matter that he cannot afterwards introduce evidence to contradict it. It has been held not proper to ask a witness if he has been accused of a certain offense or whether it was not claimed that certain criminal things were done, since all this may be true and no such crime as claimed have been committed.<sup>27</sup> But if the matter is relevant and material, especially if it does not directly disgrace the witness, the weight of authority is to the effect that he may be compelled to answer.<sup>28</sup>

**§ 1006. Where answer tends to expose to a penalty or forfeiture.**

Where the answer would expose the witness to a penalty or forfeiture the question improper and in discussing the general doctrine of the witness' privilege from answering, said: "By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. Especially ought this protection to be afforded to persons on trial for criminal offenses who often by a species of moral compulsion are forced upon the stand as a witness, and being there are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice, or crime of which they may have been guilty, or suspected of being guilty, is brought out ostensibly to effect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every protection should be afforded to guard against it." *People v. Brown*, 72 N. Y. 571. See, also; *Van Bokeling v. Berdell*, 131 N. Y. 140, 145, 29 N. E. 254; *Smith v. Smith*, 161 U. S. 85, 90.

Where the witness declines to answer a question on the ground that the answer would tend to degrade him, he will not be compelled to tell why he declines. *Merluzzi v. Gleeson*, 59 Md. 214. *Contra: New v. Fisher*, 11 Daly (N. Y.) 308.

<sup>27</sup> *State v. Kent*, 5 N. Dak. 516, 541, 67 N. W. 1052.

<sup>28</sup> *Brown v. Walker*, 70 Fed. 46, 161 U. S. 591 (on appeal); *Ex parte Irvine*, 74 Fed. 954; *Hill v. State*, 4 Ind. 112; *City of South Bend v. Hardy*, 98 Ind. 577; *Clark v. Reese*, 35 Cal. 89; *Jennings v. Prentice*, 39 Mich. 421; *State v. Nowell*, 58 N. H. 314; *Cullen v. Commonwealth*, 24 Gratt. (Va.) 624. See, also, *People v. Rector*, 19 Wend. (N. Y.) 569; *People v. Abbot*, 19 Wend. (N. Y.) 192. But compare *United States v. James*, 60 Fed.

feiture he is privileged.<sup>29</sup> "Any compulsory discovery," it is said, "by extorting the party's oath or compelling the production of his private books and papers (as in violations of the revenue laws where, as a penalty, the party must forfeit his goods) to convict him of crime or to forfeit his property is contrary to the principles of a free government; it is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of a despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."<sup>30</sup>

**§ 1007. When privilege as to refusal to answer attaches—Privilege is personal.**—Generally the witness may avail himself of the privilege to refuse to answer at any stage of the examination before he has begun to give evidence that would be detrimental to him,<sup>31</sup>

257; *McC Campbell v. McC Campbell*, (Ky.), 46 S. W. 18. See *infra* note 80.

<sup>29</sup> *Taylor v. Wood*, 2 Edw. (N. Y.) 44; *Poindexter v. Davis*, 6 Gratt. (Va.) 481; *In re Kip*, 1 Paige (N. Y.) 601; *Simmons v. Holster*, 13 Minn. 249; *Curtis v. Knox*, 2 Den. (N. Y.) 341; *In re Dickinson*, 58 How. Pr. (N. Y.) 260; *Wyckoff v. Wagner, &c. Co.* 99 Fed. 158; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 1209. Unless it is of a purely remedial character. *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 966.

As a general rule, questions asked a witness on cross-examination, are not objectionable, unless the answer may subject him to indictment or to a statutory penalty. *State v. Davidson*, 67 N. Car. 119.

<sup>30</sup> *Boyd v. United States*, 116 U. S. 616, 631. But see post § 1013.

<sup>31</sup> *Rex v. Garbett*, 2 Car. & K. 474; *Amherst v. Hollis*, 9 N. H. 107. This seemed to be the English rule without qualification, but the proviso stated in the text must be added under the American rule.

It has been held that when a witness, who is testifying in regard to a conversation about a

larceny, is excused from testifying as to what he said himself, on the ground that he would be incriminated thereby, the whole conversation in which the witness participated should be excluded. *Pinkard v. State*, 30 Ga. 757.

Where the witness can give no testimony whatever without incriminating himself the court will not even require him to be sworn. *Neal v. Coningham*, 1 Cranch (C. C.) 76.

In the equity practice, the defendant may set up his privilege by the proper pleading, and it seems that he will not be allowed to waive his privilege to refuse to testify. *Higdon v. Heard*, 14 Ga. 255.

If a witness, knowing that he is not bound to testify concerning a fact which may tend to criminate himself, voluntarily answers in part, he may be cross-examined as to the whole transaction. *Foster v. Pierce*, 11 Cush. (Mass.) 437; *Norfolk v. Gaylord*, 28 Conn. 309; *State v. Foster*, 3 Fost. (N. H.) 348; *Coburn v. Odell*, 10 Fost. (N. H.) 540; *People v. Carroll*, 3 Park Cr. R. (N. Y.) 73; *Chamberlin v. Wilson*, 12 Vt. 491.

provided he has not already gone into the transaction. But this does not mean that he is privileged from appearing and being sworn,<sup>32</sup> and the proper time to claim the privilege is when the incriminating question is asked.<sup>33</sup> The privilege of refusing to answer is strictly personal to the witness and must be claimed by him and not by any of the parties.<sup>34</sup> It is the prevailing rule, indeed, that the privilege cannot be claimed for him even by his counsel.<sup>35</sup> The court, however, usually apprises the witness of his right.<sup>36</sup> Some courts hold that it is no error for the judge to fail or decline to so inform

The witness having inadvertently given an answer to a question put for the purpose of degrading him will not be required to answer a second question of the same nature, and his answer to the first may be stricken out. *Gravett v. State*, 74 Ga. 191.

<sup>32</sup> *People v. Landes*, 82 Mich. 109, 46 N. W. 596; *Eckstein's Appeal*, 148 Pa. St. 509, 24 Atl. 63; *Ex parte Stice*, 70 Cal. 51.

<sup>33</sup> *Ex parte Park*, 37 Tex. Cr. App. 590, 40 S. W. 275, 66 Am. St. 835.

<sup>34</sup> *State v. Hill*, 52 W. Va. 296, 43 S. E. 160; *Morgan v. Halberstadt*, 60 Fed. 592; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *State v. Bilansky*, 3 Minn. 246; *State v. Hill*, 52 W. Va. 296, 43 S. E. 160; *State v. Patterson*, 2 Ired. (N. Car.) 346; *Clark v. Reese*, 35 Cal. 89; *Commonwealth v. Shaw*, 4 Cush. (Mass.) 594; *Commonwealth v. Gould*, 158 Mass. 499, 33 N. E. 556; *Newcomb v. State*, 37 Miss. 383; *State v. Wentworth*, 65 Me. 234; *Roddy v. Finnegan*, 43 Md. 490; *White v. State*, 52 Miss. 216; *State v. Foster*, 3 Fost. (N. H.) 348; *Bolen v. People*, 184 Ill. 388, 56 N. E. 408; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Ingalls v. State*, 48 Wis. 647; *People v. Teague*, 106 N. Car. 576, 19 Am. St. 547; *Brown*

*v. State*, 3 Tex. Cr. App. 210, 20 S. W. 924.

In a prosecution for illegally selling liquor the defendant cannot raise the objection that the purchasers, when examined as witnesses, cannot be compelled to criminate themselves. *Commonwealth v. Gould*, 58 Mass. 499, 33 N. E. 656.

However, if the question is an impertinent one, the party calling the witness has a right to object to the question and his objection should be sustained whether the witness objects to answering or not. *Sharon v. Sharon*, 79 Cal. 633.

The state will not be permitted to object to a witness's competency on the ground that his testimony would tend to criminate him. *Day v. State*, 27 Tex. App. 143.

<sup>35</sup> *State v. Kent*, 5 N. Dak. 516, 67 N. W. 1052; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *State v. Wentworth*, 65 Me. 234, 20 Am. R. 688; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *State v. Butler*, 47 S. Car. 25, 24 S. E. 991. But see *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316; *People v. Brown*, 72 N. Y. 571, 28 Am. R. 183.

<sup>36</sup> *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Close v. Olney*, 1 Denio (N. Y.) 319.

the witness.<sup>37</sup> If, however, upon a proper claim of the privilege it is not allowed it is error.<sup>38</sup> And if under the circumstances the witness is compelled to answer, such answer cannot be used against him in a subsequent criminal action.<sup>39</sup>

**§ 1008. Who determines whether answer tends to criminate.**

—The prevailing opinion in this country is that it is for the court to determine whether the answer to a proposed question will tend to criminate the witness.<sup>40</sup> But it is held in a number of authorities that the party himself is the judge of the effect that such answers would have as incriminating him.<sup>41</sup> The prevailing view is the

<sup>37</sup> *Commonwealth v. Shaw*, 4 Cush. 594; *Taylor v. State*, 83 Ga. 647; *Dunn v. State*, 99 Ga. 211. See, also, *State v. Comer*, 157 Ind. 611, 62 N. E. 452. Party not a witness cannot object to such refusal. *Bollen v. People*, 184 Ill. 338, 56 N. E. 408. We think the court should inform the witness of his privilege.

<sup>38</sup> *Commonwealth v. Kimball*, 24 Pick. (Mass.) 366.

<sup>39</sup> *Horstman v. Kaufman*, 97 Pa. St. 147, 39 Am. R. 802; *State v. Bailey*, 54 Iowa, 414.

<sup>40</sup> *State v. Duffy*, 15 Iowa, 425; *Floyd v. State*, 7 Tex. 215; *Ex parte Park*, 37 Tex. Cr. App. 590, 40 S. W. 275, 66 Am. St. 835; *Richman v. State*, 2 Greene (Iowa) 532; *Commonwealth v. Braynard*, Thach. Cr. Cas. (Mass.) 146; *Kirschner v. State*, 9 Wis. 140; *State v. Lonsdale*, 48 Wis. 348; *Ex parte Senior*, 37 Fla. 1; *State v. Thaden*, 43 Minn. 253; *Wyckoff v. Wagner, & Co.* 99 Fed. 158.

The witness cannot refuse to be sworn on the ground that his testimony would tend to criminate him; he can only urge such privilege after being sworn and when a question is put to him the answer to which would have a criminative tendency, then it is for the court to decide whether or not the

answer would have such an effect. *Ex parte Stice*, 70 Cal. 51.

<sup>41</sup> *Ward v. State*, 2 Mo. 120; *Warner v. Lucas*, 10 Ohio, 336; *Lister v. Boker*, 6 Blackf. (Ind.) 439; *People v. Rector*, 19 Wend. (N. Y.) 569; *Williams v. Dickenson* (Fla.), 9 So. 847. See, also, *In re Kanter*, 117 Fed. 356; *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303, holding that the privilege must be allowed unless it clearly appears that the witness is contumacious or mistaken in his claims, but that if this does appear he will not be permitted to shield himself behind the privilege.

"It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case, the witness must himself judge what his answer will be, and if he say on his oath that he cannot answer without accusing himself, he will not be compelled to answer." Chief Justice Marshall in *United States v. Burr*, 1 Burr's Trial, 245.

better rule, at least where it appears that the witness is contumacious or wrong, for otherwise a witness by a mere pretense might deprive a party of the benefit of his testimony. In the exercise of this power the court should be exceedingly cautious.<sup>42</sup>

**§ 1009. Effect claiming privilege has upon weight of testimony.**—Some of the cases hold that the fact that a witness claims and is allowed the privilege of refusing to answer when the answer would tend to criminate him should not be commented on by counsel,<sup>43</sup> nor considered as in any way affecting the weight of the additional testimony given by the witness.<sup>44</sup> This, however, is not the rule in all jurisdictions.<sup>45</sup> “But, whatever may be the view of judges and jurists upon this question, it admits of no doubt that juries will act and do act to some extent upon the evidence furnished by their own senses, and that, almost inevitably, they will draw an unfavorable inference from the conduct of the witness who declines to answer lest he may criminate himself.”<sup>46</sup>

**§ 1010. Rule where statute of limitations has run against crime.**—Where the statute of limitations has run against the crime, the commission of which the witness claims his answer would tend to convict him, he has no right to claim the privilege and may be compelled to answer even though his answers directly show that he was

<sup>42</sup> *Janvrin v. Scammon*, 29 N. H. 280; *Chamberlain v. Wilson*, 12 Vt. 49, 36 Am. Dec. 356.

<sup>43</sup> *People v. Mannausau*, 60 Mich. 15, 26 N. W. 797. See, also, *Long v. State*, 56 Ind. 182; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 735; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46; mainly based on statutes.

<sup>44</sup> *Rose v. Blakemore*, Ry. & Mo. 383; *State v. Bailey*, 54 Iowa, 414; *Crane v. Litchfield*, 2 Mich. 340. Thus it has been held that where a witness declines to answer a question upon the ground that its

tendency is to criminate him, from the claim of such privilege and its allowance, no inferences whatever can be legitimately drawn injuriously affecting either party. *Phelin v. Kenderdine*, 20 Pa. St. 354. But see *Morgan v. Kendall*, 124 Ind. 454; *Andrews v. Frye*, 104 Mass. 234; *State v. Bartlett*, 55 Me. 200; *Parker v. State*, 61 N. J. 308, 39 Atl. 651, where a somewhat different doctrine is declared.

<sup>45</sup> See *Phelin v. Kenderline*, 20 Pa. St. 354; *Morgan v. Kendall*, 124 Ind. 454; *Andrews v. Frye*, 104 Mass. 234; *State v. Bartlett*, 55 Me. 200; *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651; *State v. Bailey*, 54 Iowa, 414.

<sup>46</sup> *Jones Ev.* § 894.

guilty.<sup>47</sup> So, where he has received a full pardon he is no longer privileged.<sup>48</sup>

**§ 1011. Rule where statutes protect.**—In many of the states there are statutes which provide that any evidence given by the witness shall not be used against him in any subsequent prosecution. In such cases it has been held that he is required to give his answer.<sup>49</sup> If the statute gives complete immunity there is no doubt that the witness may be compelled to answer in a proper case; but the overwhelming weight of recent authority is to the effect that a statute which does not give complete immunity, but leaves the witness subject to prosecution for the offense to which the question relates is unconstitutional if it attempts to compel him to answer, even though

<sup>47</sup> *Moloney v. Dows*, 2 Hilt. (N. Y.) 247; *People v. Mather*, 4 Wend. (N. Y.) 229; *Weldon v. Goulard*, 15 Abb. Pr. (N. Y.) 336; *United States v. Smith*, 4 Day (Conn.) 121; *Floyd v. State*, 7 Tex. 215; *Close v. Olney*, 1 Den. (N. Y.) 319; *Manchester, &c. R. Co. v. Concord, &c. R. Co.* 66 N. H. 100, 20 Atl. 383, 49 Am. St. 582; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Roberts v. Allatt*, 1 M. & Malk. 192. See, also, *Holt v. State*, 39 Tex. Cr. App. 282, 45 S. W. 1016; *Childs v. Merrill*, 66 Vt. 302.

<sup>48</sup> See *Bishop Atterbury's Trial*, 16 How. St. Tr. 604; *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364. But a mere promise of pardon to an accomplice is insufficient to take away the privilege. *Ex parte Irvine*, 74 Fed. 945, 964. But it has been held that where the witness turns "state's evidence," and on promise of pardon agrees to give his testimony, he can keep back nothing. *Alderman v. People*, 4 Mich. 414. After acquittal the privilege is lost. *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698; *People v. Ogle*, 104 N. Y. 511.

<sup>49</sup> *State v. Nowell*, 58 N. H. 314 (if the statute gives complete immunity); *Wilkins v. Malone*, 14 Ind. 153; *Kneeland v. State*, 62 Ga. 395; *La Fontaine v. Southern, &c. Ass'n*, 83 N. Car. 132; *United States v. McCarthy*, 18 Fed. 87; *State v. Hatfield*, 3 Head (Tenn.) 231; *State v. Enochs*, 69 Ind. 314; *State v. Quarles*, 13 Ark. 307; *Kain v. State*, 16 Tex. App. 282; *Higdon v. Heard*, 14 Ga. 255; *Bedgood v. State*, 115 Ind. 275; *Commonwealth v. Bell*, 145 Pa. St. 374; *People v. Reggel*, 8 Utah, 21, 28 Pac. 955; *People v. Hackley*, 24 N. Y. 74 (overruled in *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353).

It seems that such a statute has no application to the offense of keeping a lottery. *Temple v. Commonwealth*, 75 Va. 892.

See *Counselman v. Hitchcock*, 142 U. S. 547, where all the earlier authorities on this subject are reviewed, it is held that the witness has a right to refuse to answer unless the statute provides that his giving testimony shall be an absolute bar of a future prosecution.

it provides generally that such answer shall not be used in evidence on a prosecution against himself.<sup>50</sup>

**§ 1012. Waiver of privilege—Refusal to answer.**—The privilege of refusing to answer being personal to the witness he may waive it and answer. If he testifies to a part of a transaction tending to criminate himself he will generally be deemed to have waived his privilege and may be required to give the whole transaction.<sup>51</sup> But it seems that although the witness may have testified in part before the grand jury

<sup>50</sup> The leading case of *Counselman v. Hitchcock*, 142 United States, 547, 12 Sup. Ct. 195, to this effect, has been approved and followed in many recent cases, among which are *People v. O'Brien*, 176 N. Y. 253; *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 43 Am. St. 127; *Smith v. Smith*, 116 N. Car. 386, 21 S. E. 96; *Ex parte Arnot Carter*, 166 Mo. 604, 66 S. W. 540; *State v. Simmons Hardware Co.* 109 Mo. 118, 18 S. W. 1125; *Miskimnis v. Shaver*, 8 Wyo. 392, 58 Pac. 411. See, also, *Emery's Case*, 107 Mass. 172; *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644; *State v. Nowell*, 58 N. H. 314; *In re Scott*, 95 Fed. 815. As to the constitutionality and construction of such statutes, see, also, *People v. Butler, &c. Co.* 201 Ill. 236, 66 N. E. 349; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *State v. Bach, &c. Co.* 67 Ark. 169, 55 S. W. 854; *Commonwealth v. Bell*, 145 Pa. St. 374, 22 Atl. 641; *Elliott v. State*, 84 Tex. 105, 19 S. W. 249; *United States v. Price*, 96 Fed. 960; *People v. Adams*, 176 N. Y. 351, 68 N. E. 636; *In re Briggs*, 98 N. Car. 454, 47 S. E. 403; *Interstate Commerce Com. v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563.

<sup>51</sup> *Brown v. Brown*, 5 Mass. 320; *Youngs v. Youngs*, 5 Redf. (N. Y.) 505; *Norfolk v. Gaylord*, 28 Conn. 309; *State v. Nichols*, 29 Minn. 357;

*People v. Freshour*, 55 Cal. 375; *Foster v. Pierce*, 11 Cush. (Mass.) 437; *Chamberlain v. Willson*, 12 Vt. 491; *Commonwealth v. Pratt*, 126 Mass. 462; *Howell v. Parish*, 26 La. Ann. 6; *Johnson v. Commonwealth*, 115 Pa. St. 369; *State v. Thomas*, 98 N. Car. 599. See, also, ante § 1001, and *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

If he innocently or through mistake makes a statement tending to criminate him, he will be excused from any further examination in regard to such statement. *Coburn v. Odell*, 10 Fost. (N. H.) 540; *Mays v. Mays*, 119 Mass. 290.

Where a witness waives his privilege he becomes subject to the same rules and tests applicable to other witnesses. *State v. Ober*, 52 N. H. 459.

The witness testifying that he did not commit the crime alleged, thereby waives his constitutional privilege and may be cross-examined as to any matter relevant to the issue. *Commonwealth v. Nichols*, 114 Mass. 285; *Commonwealth v. Tolliver*, 119 Mass. 312. But see *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303.

If a defendant in a criminal case avails himself of the privilege of testifying in his own behalf, he subjects himself in general to the same rules of cross-examination



or coroner or even on a former trial, this is not a waiver of his privilege on another trial.<sup>52</sup> As a general rule, if a witness refuses to answer questions which he may lawfully be required to answer he is guilty of contempt of court, and if he remains obstinate he may usually be punished for contempt.<sup>53</sup> But there are some cases in which the court ought not, and, perhaps, cannot rightfully, adopt this course, and in a recent case it was held that an order for a physical examination of the plaintiff should be enforced by delaying or dismissing the proceeding.<sup>54</sup>

**§ 1013. Incriminating documents and articles — Unlawful searches and seizures.**—Documents, counterfeit money, lottery tickets, gambling devices, weapons, and other articles may furnish or constitute persuasive evidence of guilt in many cases, and in many instances they are admissible notwithstanding a claim of privilege.<sup>55</sup> It is frequently stated in general terms that it makes no difference as to the admissibility of evidence whether it was obtained lawfully or unlawfully,<sup>56</sup> and a recent decision of the Supreme Court of the

as do other witnesses. *State v. Abrams*, 11 Ore. 169; *Disque v. State*, 49 N. J. L. 249; *People v. Tice*, 131 N. Y. 651.

<sup>52</sup> *Temple v. Commonwealth*, 75 Va. 892; *Cullen v. Commonwealth*, 24 Gratt. 624; *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *Emery v. State*, 101 Mo. 627, 78 N. W. 145; *Georgia, &c. R. Co. v. Lybrand*, 99 Ga. 421, 25 S. E. 669. See, also, *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *Hackney v. State*, 101 Ga. 512, 28 S. E. 1007. But see *contra*, *State v. Van Winkle*, 80 Iowa, 15, 45 N. W. 388; *State v. Burrell*, 27 Mont. 282, 70 Pac. 982.

<sup>53</sup> *State v. Lonsdale*, 48 Wis. 348; *Ex parte Harris*, 4 Utah, 5; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *In re Gannon*, 69 Cal. 541; *Whitcomb's Case*, 120 Mass. 118, 21 Am. R. 502.

<sup>54</sup> *South Bend v. Turner*, 156 Ind.

418, 60 N. E. 271, 83 Am. St. 200, 209.

<sup>55</sup> *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *Commonwealth v. Henderson*, 140 Mass. 303, 5 N. E. 832; *Shields v. State*, 104 Ala. 35, 16 So. 85; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465, and note; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *State v. Atkinson*, 40 S. Car. 363, 18 S. E. 1021; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Bacon v. United States*, 97 Fed. 35; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 1046; *State v. Van Tassel*, 103 Iowa, 6, 72 N. W. 497; *State v. Burroughs*, 72 Me. 479; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. 741, 38 N. E. 1003.

<sup>56</sup> *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *State v. Flynn*,

United States emphasizes this proposition. In the case referred to,<sup>57</sup> it is held that the admissibility of documentary evidence tending to establish the offense charged is not affected by the fact that it was secured in violation of the constitutional prohibition against unreasonable searches and seizures, and that where the accused is not compelled to testify or make any admissions relative to such documents, their introduction in evidence against him is not a violation of the rule or constitutional provision against compulsory self-incrimination.<sup>58</sup> Many of the cases cited make no distinction as to the character of the document or the manner or authority in which or by which they are seized, but there is much reason for drawing some distinction, at least in criminal cases. Judge Cooley takes the view that it is only where the public or the complainant has an interest in the property taken from the accused, or in its destruction, that it is admissible against him,<sup>59</sup> and certainly the court could not rightfully compel the accused to produce private papers that would so speak as to incriminate him.<sup>60</sup> After a careful review of the authorities a recent writer draws a similar distinction and states his conclusions as follows: "The cases show the general rule to be that private papers and things are generally held admissible in evidence against the one unjustly or unwittingly deprived of their possession, if they are not taken or their production required by the government itself; in such case the agent is responsible as an individual for his conduct, but the courts will avail themselves of the fruits of his work if relevant and competent. And the line of distinction between things which may be produced and put in

36 N. H. 64; *Commonwealth v. Dana*, 2 Met. (Mass.) 329; *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Commonwealth v. Acton*, 165 Mass. 11, 42 N. E. 329; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002. See, also, *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *Leggatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, 14 East, 305, note.

<sup>57</sup> *Adams v. People of New York*, 192 U. S. 585, 24 Sup. Ct. 372, affirming *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, and distinguishing *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524.

<sup>58</sup> This was so held in the case cited, although the papers taken under the search warrant were private papers, seized together with policy slips or lottery tickets, and did not relate directly to the crime.

<sup>59</sup> *Cooley Const. Lim.* 370. This is also the view of the annotators in 59 L. R. A. 468 and 75 Am. St. 329, 330.

<sup>60</sup> See *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *McGinnis v. State*, 24 Ind. 500; *State v. Simmons Hardware Co.* 109 Mo. 127, 18 S. W. 1126, 15 L. R. A. 678; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524; *State v. Davis*, 108

evidence and those the production of which would contravene constitutional principles seems to lie between articles which have no voice and cannot speak for themselves, and which furnish evidence only because of their character as tokens of a crime, and of their connection with the subject matter, on the one hand, and articles in the nature of letters and papers which speak their own language and for themselves, and which frequently constitute admissions, and which are required by law to be produced for use against their owner, on the other hand. There seems to be no question but that papers and things are admissible in evidence against an accused person from whom they were obtained by lawful search and seizure. And it appears that papers of a public nature, or in which the public has an interest, and things which are unlawfully the subject of private property, are always admissible in evidence against an accused person."<sup>61</sup>

§ 1014. Rule as to corporal inspection.—It has been held in some cases that a party as a witness in a civil case may refuse to exhibit his person to the jury, or to persons appointed by the court to inspect.<sup>62</sup> But the weight of authority is to the effect that it is within the sound discretion of the court, and when not injurious to health and not offending decency and upon proper application there may be such inspection.<sup>63</sup> In criminal cases, however, there is a decided conflict among the authorities,<sup>64</sup> and it would seem that

Mo. 666, 18 S. W. 894; *United States v. Wong Quong Wong*, 94 Fed. 832.

<sup>61</sup> Note in 59 L. R. A. 474.

<sup>62</sup> *Peoria, &c. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *Penns. Co. v. Newmeyer*, 129 Ind. 401, 409, 28 N. E. 860; *R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000; *McQuigan v. Delaware, &c. R. Co.* 129 N. Y. 50, 29 N. E. 235; *Stuart v. Havens*, 17 Neb. 211.

<sup>63</sup> *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 83 Am. St. 200, and note, 54 L. R. A. 396. (But see *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462.) *Lyon v. R. R. Co.* 142 N. Y. 298, 37 N. E. 113; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616; *King v. State*,

100 Ala. 85, 14 So. 878; *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871; *Bagley v. Mason*, 69 Vt. 175; *Shepard v. Missouri, &c. R. Co.* 85 Mo. 629; *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922; *Miami, &c. Co. v. Baily*, 37 Ohio St. 104; *St. Louis, &c. R. Co. v. Dobbins*, 60 Ark. 485, 31 S. W. 147. In some of the authorities to this effect, however, the decision was based on a statute so providing.

<sup>64</sup> The identity of the defendant in a criminal case being in dispute, and one of the witnesses having testified that he was acquainted with the defendant and that he had tattooed on one of his arms the outline of a female head and

a compulsory physical examination, or the like, might, in many instances, amount to compelling the accused to criminate himself, and hence be a violation of the rule and constitutional provision on that subject. But merely requiring the defendant to stand up for identification is not compelling him to give evidence against himself within the rule.<sup>65</sup>

### § 1015. Witness in court attendance protected from process.

—While a person is in attendance in court as a witness in a cause he is protected from civil process.<sup>66</sup> Some of the decisions hold

bust, it was held not to contravene the defendant's constitutional privilege against giving evidence tending to criminate himself by compelling him to exhibit his tattooed arm to the jury. *State v. Ah Chuey*, 14 Nev. 79. See, also, *State v. Graham*, 74 N. Car. 646, 21 Am. R. 493. In *Blackwell v. State*, 67 Ga. 76, where the defendant was on trial for murder, and the extent of an amputation of one of his legs because a material question, it was held error to compel him to exhibit his leg to the jury. In *Day v. State*, 63 Ga. 669, 44 Am. R. 717, the court, in discussing this question said: "By the constitution of this state no person shall be compelled to give testimony tending in any manner to criminate himself, nor can one, by force, compel another against his consent, to put his foot in a shoe-track for the purpose of using it as evidence against him on the criminal side of the court." In the case of *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. R. 72, it was held that on a prosecution for murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury and having proved that the

mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, it was held he was entitled to a new trial." See, also, *State v. Jacobs*, 5 N. Car. 259; *People v. McCoy*, 45 How. Pr. (N. Y.) 216; *People v. Mead*, 50 Mich. 228.

<sup>65</sup>*State v. Reasby*, 100 Iowa, 231, 69 N. W. 451; *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. 741. See, also, *Walker v. State*, 7 Tex. App. 245, 32 Am. R. 595; *Myers v. State*, 97 Ga. 76. But compare *Williams v. State*, 98 Ala. 52; *State v. Johnson*, 67 N. Car. 55.

<sup>66</sup>Note in 3 L. R. A. 266; note in 25 L. R. A. 721; *Mitchell v. Huron Judge*, 53 Mich. 541; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Seaver v. Robinson*, 3 Duer (N. Y.) 622; *Matthews v. Tufts*, 87 N. Y. 568; *In re Healy*, 53 Vt. 694; *Halsey v. Stewart*, 4 N. J. L. 420; *Vincent v. Watson*, 1 Rich. (S. Car.) 194; *Martin v. Ramsey*, 7 Humph. (Tenn.) 260; *Green v. Young*, 120 Ill. 184; *May v. Shumway*, 16 Gray (Mass.)

that the privilege does not extend to criminal cases or arrests where bail is required,<sup>87</sup> while others hold that it applies to all kinds of process, even to summons in a civil case.<sup>68</sup> The witness is privileged while going and in actual attendance upon the court and for a reasonable time to prepare for his departure.<sup>69</sup> A person who comes into

86; *Ballinger v. Elliott*, 72 N. Car. 596; *Juneau Bank v. McSpedun*, 5 Biss (U. S.) 64; *Newton v. Askew*, 6 Hare, 319; *In re Cannon*, 47 Mich. 481; *Palmer v. Rowan*, 21 Neb. 455; *Norris v. Beach*, 2 Johns. (N. Y.) 293; *Clark v. Grant*, 2 Wend. (N. Y.) 257; *Person v. Grier*, 66 N. Y. 124; *Ex parte Hall*, 1 Tyler (Va.) 274; *Miles v. McCullough*, 1 Binn. (Pa.) 77; *Dungan v. Miller*, 37 N. J. L. 182; *Sadler v. Ray*, 5 Rich. (S. Car.) 523; *In re Dickenson*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217; *Thompson's Case*, 122 Mass. 428; *Parker v. Hotchkiss*, 1 Wall. Jr. (C. C.) 269; *Arding v. Flower*, 8 T. R. 534; *Persse v. Persse*, 5 H. L. Cas. 682.

The rule applies before a court of the United States. *Page v. Randall*, 6 Cal. 32.

"This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority." *Matthews v. Tufts*, 87 N. Y. 568.

"The privilege of a suitor or witness to be exempt from service of process while within the jurisdiction of his residence for the purpose of attending court in an action to which he is a party or in which he is to be sworn as a witness is a very ancient one. It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which di-

rectly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity, and in order to promote the 'due and efficient administration of justice.'" *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989.

<sup>87</sup> *Marshall v. Carhart*, 20 Ga. 419; *In re Douglas*, 3 G. & D. 509, 3 Q. B. 825. See, also, *Byler v. Jones*, 22 Mo. App. 623; *Moore v. Greene*, 73 N. Car. 394; *Scott v. Curtis*, 27 Vt. 762. In *Ex parte Levi*, 28 Fed. 651, 652, it is said that not one case can be found in which the privilege has been allowed under an arrest on a criminal charge.

<sup>88</sup> *Seaver v. Robinson*, 3 Duer (N. Y.) 622; *Person v. Grier*, 66 N. Y. 124; *Grafton v. Weeks*, 7 Daly (N. Y.) 523.

Contra as to service of civil process: *Wilder v. Welsh*, 1 MacArthur (D. C.) 566. See, also, *Hunter v. Cleveland*, 1 Brev. 167; *Pol-lard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. (N. Y.) 70; *Hopkins v. Coburn*, 1 Wend. (N. Y.) 292. Where the witness comes from another state it is almost universally held that he is privileged, although there is some difference of opinion as to whether parties are privileged.

<sup>89</sup> *Smythe v. Banks*, 4 Dall. (U. S.) 329; *Huddleson v. Prizer*, 9 Phila. (Pa.) 65; *Sidgier v. Birch*, 9 Ves. 69; *Vincent v. Watson*, 1 Rich. (S. Car.) 194.

a state for the purpose of giving evidence in a suit pending in court cannot be arrested or served with process while he properly remains there.<sup>70</sup> However, he will not be protected from an arrest to answer to a criminal charge<sup>71</sup> where the crime is committed in a different state

No action lies for the arrest on civil process of a witness returning home from a court and privileged from arrest. *Smith v. Jones*, 76 Me. 138.

The tendency has been not to restrict but to enlarge the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court and for a reasonable time in going and returning. *Larned v. Griffin*, 12 Fed. 592.

<sup>70</sup> *Henegar v. Spangler*, 29 Ga. 217; *Jones v. Knauss*, 31 N. J. Eq. 211, 216; *Solomon v. Underhill*, 1 Campb. 229; *Ballinger v. Elliott*, 72 N. Car. 596; *Brett v. Brown*, 13 Abb. Pr. U. S. 295; *May v. Shumway*, 16 Gray (Mass.) 86; *Person v. Pardee*, 6 Hun (N. Y.) 477; *Thompson's Case* (Mass.), 122 Mass. 428; *Sherman v. Gundlach*, 37 Minn. 118; *First Nat. Bank v. Ames*, 21 Neb. 452; *Kauffman v. Kennedy*, 25 Fed. 785; *Small v. Montgomery*, 23 Fed. 707; *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 266; *Person v. Greer*, 66 N. Y. 124, 23 Am. R. 35; *In re Healey*, 53 Vt. 694, 38 Am. R. 713; note in 25 L. R. A. 721.

In *Bolgiano v. Gilbert Lock Co.* 73 Md. 132, 25 Am. St. 582, the court, in speaking of this subject, said: "The tendency, however, of the courts in this country is to enlarge the privileges and afford full protection to suitors and witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time

in going and returning; and we think the decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another state, who comes into this state as a witness to give evidence in a cause here, from service of process for the commencement of a civil action against him in this state, and that the privilege protects him in staying and returning, provided he acts bona fide and without unreasonable delay." But see the late case of *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, where a party was held not privileged.

An attorney attending court in another state and taking part in the trial of a cause is not exempt from service. *Robbins v. Lincoln*, 27 Fed. 342.

<sup>71</sup> *Scott v. Curtis*, 27 Vt. 762; *Byler v. Jones*, 22 Mo. App. 623; *Addicks v. Bush*, 1 Phila. (Pa.) 19; *Williams v. Bacon*, 10 Wend. (N. Y.) 636; *Key v. Jetts*, 1 Pittsb. (Pa.) 117; *Moore v. Green*, 73 N. Car. 394; *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 206. In the last case just cited, the court said: "The authorities, ancient and modern, are in substantial harmony upon the proposition that a witness from a foreign jurisdiction is under the protection of the law, although some of the cases deny this immunity to parties. The reason for this rule regarding witnesses, as generally given, is, that, as they cannot be compelled to leave their own state, they should, as far as possible, be encouraged to voluntarily come in-

from that in which the arrest is made. But the privilege may be waived by the witness.<sup>72</sup>

**§ 1016. Proceedings in which privilege is allowed.**—Courts have recognized the privilege during attendance upon the following proceedings: Bankruptcy,<sup>73</sup> arbitration,<sup>74</sup> reference,<sup>75</sup> insolvency,<sup>76</sup> chancery before a master,<sup>77</sup> and habeas corpus.<sup>78</sup> So, in a case adjourned from day to day on account of the absence of one of the parties because of illness, a witness waiting for the trial to proceed is privileged.<sup>79</sup> And while in attendance upon the taking of a deposition witnesses have been held entitled to claim this privilege.<sup>80</sup>

to the state where the action is pending and give their testimony in open court. But the policy of protection, as sound principles require, and many courts assert, extends as well to parties as to witnesses."

<sup>72</sup> Washburn v. Phelps, 24 Vt. 506; Gyer v. Irwin, 4 Dall. (U. S.) 107; Randall v. Crandall, 6 Hill (N. Y.) 342; Tipton v. Harris, Peck (Tenn.) 414; Farmer v. Robbins, 47 How. Pr. (N. Y.) 415; Green v. Bonnaillon, 2 Miles, 219; Stewart v. Howard, 15 Barb. (N. Y.) 26; Wood v. Davis, 34 N. H. 328; Smith v. Jones, 76 Me. 138, 49 Am. R. 598; King v. Phillips, 70 Ga. 409.

<sup>73</sup> Matthews v. Tufts, 87 N. Y. 568.

<sup>74</sup> Moore v. Booth, 3 Ves. Jr. 350.

<sup>75</sup> Vinsent v. Watson, 1 Rich. L. (S. Car.) 194.

<sup>76</sup> Richards v. Goodson, 2 Va. Cas. 381.

<sup>77</sup> Dungan v. Miller, 37 N. J. L. 182.

<sup>78</sup> Reg. v. Blake, 2 Nev. & Man. 312.

<sup>79</sup> Ellis v. De Garmo, 17 R. I. 715.

<sup>80</sup> Atchison v. Morris, 11 Fed. 582.

For an elaborate review of the authorities and a fuller treatment of the subject of the privilege of a witness as to questions or answers that degrade or disgrace, see leading article in 59 Cent. Law Jour. 143, 164, 184.

## CHAPTER XLVIII.

### INTERPRETERS.

Sec.	Sec.
1017. Meaning of term.	1023. What persons heard through interpreters—Those unfamiliar with English.
1018. The rule.	
1019. Statutes.	1024. Interpreters for the physically weak, and deaf mutes.
1020. Court determines necessity.	1025. The oath.
1021. Discretion of court as to person employed.	1026. Who competent.
1022. Discretion of court as to manner of examination.	1027. Impeaching the interpreter.

§ 1017. **Meaning of term.**—An interpreter, as the term is used in this connection, is a person sworn at a trial to interpret the testimony of a foreigner or a deaf and dumb witness to the court or to the court and jury. Such persons are sometimes called court interpreters in order to distinguish them from mere translators or unsworn persons who interpret words or signs outside of court. We are here dealing with the subject of the examination of witnesses, and our object is to show how, and under what circumstances, their testimony may be delivered and understood by means of interpreters.<sup>1</sup>

<sup>1</sup> It may be noted here, however, that it has been held that where two persons converse through an interpreter, they assume that he is trustworthy and presumptively make his language their own and that the fact that the conversation was had through an interpreter, while it may affect the weight of the evidence thereof, does not

render it incompetent. *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355. See, also, *Camerlin v. Palmer Co.* 10 Allen (Mass.) 539; *Fabrigas v. Mostyn*, 20 St. Tr. 81, 171. For a case in which it was held that a professional interpreter could not testify as an expert that a foreigner who spoke broken English was incapable of understand-



§ 1018. **The rule.**—Whenever in the court's discretion it seems necessary to get before the court and jury oral evidence bearing upon matters in issue from persons who cannot make themselves understood, the court may appoint an interpreter.<sup>2</sup> The right of the court to do so existed at common law, and, in many cases, it would seem to be not only the right but the duty of the court to make such an appointment in the furtherance of justice.<sup>3</sup> Otherwise a party might be deprived of a material witness, and, indeed, might be wholly precluded from establishing a meritorious cause of action or defense.

§ 1019. **Statutes.**—In some jurisdictions the appointment of interpreters is provided for by statute.<sup>4</sup> But where there are such statutes, they are, so far as the existence of the power is concerned, merely declaratory of the common law, lodging with the court the power to make such appointment.<sup>5</sup> For by these statutes few, if any, fundamental changes are made in the common law rules.<sup>6</sup>

§ 1020. **Court determines necessity.**—Whether or not an interpreter is necessary should be determined by the trial court.<sup>7</sup> The trial court is, of necessity, better able to judge of the necessity than the appellate court. However, if it is arbitrarily exercised to the prejudice of the complaining party, it may, we think, be reviewed on appeal.<sup>8</sup>

§ 1021. **Discretion of court as to person employed.**—The court has discretion as to the person who shall be employed in the capacity of interpreter, and, unless abused to the injury of the complaining

ing and properly employing certain English words. *Hociss v. State*, 56 N. J. L. 44, 27 Atl. 800.

<sup>2</sup> *People v. Ah Wee*, 48 Cal. 236; *Chicago, &c. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436; *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *Haupt v. Haupt*, *Wright* (Ohio) 156; *Wright v. Masevas*, 56 Barb. (N. Y.) 521; *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355; *People v. McGee*, 1 Den. (N. Y.) 19.

<sup>3</sup> *Chicago, &c. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436; *Reg. v. Entrehman*, C. & M. 248, 41 E. C. L. 139.

<sup>4</sup> See, for instance, *Skaggs v.*

*State*, 108 Ind. 53, 56, 8 N. E. 695; *Commonwealth v. Sanson*, 67 Pa. St. 322; *People v. Young*, 108 Cal. 8, 41 Pac. 281, and authorities cited in next two notes.

<sup>5</sup> *Schall v. Eisner*, 58 Ga. 190.

<sup>6</sup> *Livar v. State*, 26 Tex. App. 115.

<sup>7</sup> *People v. Young*, 108 Cal. 8, 41 Pac. 281; *Skaggs v. State*, 108 Ind. 53, 56, 8 N. E. 695; *State v. Severson*, 78 Iowa, 653, 43 N. W. 533; *Horn v. State*, 98 Ala. 23, 13 So. 329; *People v. McGee*, 1 Den. (N. Y.) 19.

<sup>8</sup> *Chicago, &c. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436, and last note to first section of this chapter.

party, the exercise of this discretion will not be reviewed.<sup>9</sup> Thus, the fact that the interpreter is not an adept will not be cause for reversal, at least where it does not appear that the complaining party was injured.<sup>10</sup> The accuracy and effect of the interpretation in such a case is ultimately a question for the jury rather than for the court.<sup>11</sup>

**§ 1022. Discretion of court as to manner of examination.**—In the absence of a valid statute conclusively determining the matter—and there are few if any such statutes—the manner in which the examination shall be conducted through interpreters is a matter to be regulated by the trial court in the exercise of its discretion.<sup>12</sup> Thus, if the court deems it necessary to appoint more than one interpreter, in order to get the facts properly before the court and jury, it may do so.<sup>13</sup> It is not meant, however, that the trial court can carry on the examination in a manner wholly foreign to ordinary practice and settled rules upon the subject without a party who is injured thereby having any right to a review of such action on appeal. We suppose, for instance, that if the court should admit testimony through unsworn interpreters, over proper objection, and refuse to have them sworn, although demanded by the adverse party, the latter, by duly excepting, showing injury, and properly presenting the question, could certainly have such action reviewed. So, as already shown, there are cases in which the refusal to appoint or hear any interpreter is reversible error.

**§ 1023. What persons heard through interpreters—Those unfamiliar with English.**—A person called as a witness who cannot speak the English language may be heard through an interpreter that understands and can speak both the language, dialect or vernacular of

<sup>9</sup> Swift v. Applebone, 23 Mich. 252; State v. Thompson, 14 Wash. 285, 44 Pac. 533; Chicago, &c. R. Co. v. Shenk, 131 Ill. 283, 23 N. E. 436; People v. Ramirez, 56 Cal. 533, 38 Am. R. 73; Barber, &c. Co. v. Odasz, 57 U. S. App. 129, 85 Fed. 754.

<sup>10</sup> Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

<sup>11</sup> Skaggs v. State, 108 Ind. 53,

8 N. E. 695; United States v. Gilbert, 2 Sumn. (U. S. C. C.) 19; Schnier v. People, 23 Ill. 11. Of course, however, the court decides whether he is competent before appointing him.

<sup>12</sup> Skaggs v. State, 108 Ind. 53, 57, 8 N. E. 695.

<sup>13</sup> Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

the witness and the English language.<sup>14</sup> The interpreter should interpret and report to the court every statement made by the witness.<sup>15</sup>

**§ 1024. Interpreters for the physically weak and deaf-mutes.**

An interpreter may be appointed to repeat the words of a witness who, from his physical condition, is unable to speak loud enough to be heard by the court or jury.<sup>16</sup> A deaf-mute may testify by signs which may be interpreted to the court and jury.<sup>17</sup> However, if a deaf and dumb person can communicate by writing, he may be required to give his testimony in that mode.<sup>18</sup> In case but one person is familiar with the signals of the mute, that person should be appointed.<sup>19</sup>

**§ 1025. The oath.**—The interpreter takes an oath truly to interpret between the court and jury and the witness.<sup>20</sup> After the oath is administered to the interpreter the witness is sworn through the interpreter, who translates the oath into the language of the witness.<sup>21</sup> But one called to give a translation of a conversation heard by him out of court need not be sworn as an interpreter, since his testimony is covered by his oath as a witness.<sup>22</sup>

<sup>14</sup> *People v. Wong Ah Bang*, 65 Cal. 305; *Schall v. Eisner*, 58 Ga. 190; *Chicago, &c. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436; *Kuhtman v. Brown*, 4 Rich. L. (S. Car.) 479; *Norberg's Case*, 4 Mass. 81; *Amory v. Fellowes*, 5 Mass. 219, 226.

"A witness may translate to the jury documents written by him in a foreign language without being sworn as an interpreter." *Kuhlman v. Medlinka*, 20 Tex. 385.

<sup>15</sup> *People v. Wong Ah Bang*, 65 Cal. 305, 3 West. Coast R. 58.

<sup>16</sup> *Conner v. State*, 25 Ga. 521, 75 Am. Dec. 184.

<sup>17</sup> *Ruston's Case*, 1 Leach C. C. 455; *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *Commonwealth v. Hill*, 14 Mass. 207; *State v. DeWolf*, 8 Conn. 93; *State v. Weldon*, 39 S. Car. 318; *State v. Burns* (Iowa), 78 N. W. 681.

<sup>18</sup> *Morrison v. Lennard*, 3 Car. &

P. 127. See, also, *State v. Howard*, 118 Mo. 127, 24 S. W. 41.

<sup>19</sup> *People v. McGee*, 1 Den. (N. Y.) 19.

<sup>20</sup> *Norberg's Case*, 4 Mass. 81; *Amory v. Fellowes*, 5 Mass. 219; *Vandervoort v. Smith*, 2 Cal. (N. Y.) 155; *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184; *People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920; *State v. Weldon*, 39 S. Car. 318, 17 S. E. 688; *People v. Ah Yute*, 56 Cal. 119; *People v. Wong Ah Bang*, 65 Cal. 305, 3 West. Coast R. 58.

The interpreter may take the suggestion of third person as to what is a correct and true interpretation. *United States v. Gilbert*, 2 Sumn. (U. S.) 19.

<sup>21</sup> *Norberg's Case*, 4 Mass. 81.

<sup>22</sup> *Commonwealth v. Kepper*, 114 Mass. 278; *People v. Ah Wee*, 48 Cal. 236.

§ 1026. **Who competent.**—A person who is unfair or biased should not be appointed;<sup>23</sup> but a person is not incompetent to act as an interpreter merely because he is a witness in the cause.<sup>24</sup> Mere friendship existing between the interpreter and a party will not make the former incompetent,<sup>25</sup> although a near relationship may.<sup>26</sup> It has also been held that the next friend of an infant plaintiff may be appointed.<sup>27</sup>

§ 1027. **Impeaching the interpreter.**—The interpretation given by the interpreter is not necessarily conclusive. If the interpreter is deemed incompetent from lack of training by one of the parties, or is considered to be biased so that his translation is incorrect, it may be impeached.<sup>28</sup> An interpreter should give a correct translation of all the witness says, and if either party conceives that a word or phrase has been incorrectly translated he may show that fact.

<sup>23</sup> State v. Thompson, 14 Wash. 285, 44 Pac. 533.

<sup>24</sup> Chicago, &c. R. Co. v. Shenk, 131 Ill. 283, 23 N. E. 436; People v. Ramirez, 56 Cal. 533, 38 Am. R. 73.

<sup>25</sup> State v. Burns (Iowa), 78 N. W. 681.

<sup>26</sup> See Barber, &c. Co. v. Odasz, 57 U. S. App. 129, 85 Fed. 754; State

v. Thompson, 14 Wash. 285, 44 Pac. 533.

<sup>27</sup> Swift v. Applebone, 23 Mich. 252.

<sup>28</sup> Schnier v. People, 23 Ill. 11, 17; United States v. Gilbert, 2 Sumn. (U. S.) 19; Skaggs v. State, 108 Ind. 53, 8 N. E. 695; Ulrich v. People, 39 Mich. 245.

## CHAPTER XLIX.

### EXPERT AND OPINION EVIDENCE—IN GENERAL.

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§ 1028. **Definition of expert.**—It is not easy to give an exact or precise definition of the term "expert" that will fit all cases, but a reference to some of the definitions that have been suggested by the courts and text writers will sufficiently explain, in a general way, the meaning of the term. One of the oldest definitions is that approved in an Indiana case. It is as follows: "From the Latin, *experti*, which signifies instructed by experience. Persons who are selected by the courts or the parties in a cause, on account of their

knowledge or skill, to examine, estimate and ascertain things, and make a report of their opinion.”<sup>1</sup> Greenleaf refers to them as “persons of skill.”<sup>2</sup> Strickland speaks of them as “persons professionally acquainted with the science of practice,”<sup>3</sup> and a similar definition is given in a Connecticut case.<sup>4</sup> In a Massachusetts case it is said that an “expert is a person of large experience in any particular department of art, business or science,”<sup>5</sup> and in a New York case it is said that “an expert is one instructed by experience, and to become one requires a course of previous habit and practice or of study, so as to be familiar with the subject.”<sup>6</sup> Practice, experience and observation may qualify one as an expert in a particular art or business without special study, and it has been said that “all persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required.”<sup>7</sup> So, as will be hereafter shown, special study and education may qualify one as an expert in some matters without actual practice. There is no hard and fast rule that can be laid down as to just what amount of knowledge, skill or experience any particular witness must possess in order to be qualified to speak as an expert, and while the trial court should be guided by the general rules established in regard to the subject their application, in so far as it depends on questions of fact, is necessarily very largely within the discretion of that court.

**§ 1029. Meaning of term “expert opinion evidence.”**—By expert opinion is generally meant the opinion of an expert or the opinions of persons examined as witnesses in a cause, who testify in regard to some professional or technical matter arising in the case, and who are permitted to give their opinions as to such matter on account

<sup>1</sup> Nelson v. Johnson, 18 Ind. 329, 334.

<sup>2</sup> 1 Greenleaf Ev. § 440. So in Rochester v. Chester, 3 N. H. 349, 365.

<sup>3</sup> Strickland Ev. 408.

<sup>4</sup> Bryan v. Branford, 50 Conn. 246.

<sup>5</sup> Dickenson v. Fitchburg, 13 Gray (Mass.) 546, 555.

<sup>6</sup> Nelson v. Sun Mut. Ins. Co. 71 N. Y. 453, 460. Approved in Pendleton v. Saunders, 19 Ore. 9, 24 Pac. 506. For other definitions see Jones v. Tucker, 41 N. H. 546; Dole

v. Johnson, 50 N. H. 452; Farmers. &c. Bank v. Woodell, 38 Ore. 294. 61 Pac. 837, 840, 65 Pac. 520; Buf-fum v. Harris, 5 R. I. 243; State v. Phair, 48 Vt. 366. In the last case just cited an expert is defined as “a person that possesses peculiar skill and knowledge upon the subject matter that he is required to give an opinion upon.”

<sup>7</sup> Vanderdouckt v. Thelusson, 8 Bird v. Commonwealth, 21 Gratt. (Va.) 800.

of their special training, skill or familiarity with it.<sup>8</sup> Or, as defined in an article upon the subject, "expert opinion evidence is testimony in the form of an opinion, based upon facts proved or assumed, concerning a matter involving scientific or technical knowledge, and not within the experience of the ordinary witness."<sup>9</sup>

A recent writer has distinguished between "expert testimony as to facts" and "expert opinion evidence," on the ground that the former is nothing more than ordinary testimony as to facts given by witnesses who are specially qualified by observation and experience to give it, and that the latter is real opinion evidence which has its value in some special qualification of the witness to form an opinion on the subject, which qualification the jury does not possess.<sup>10</sup>

**§ 1030. The rule and reason of the rule.**—"The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject matter so far partakes of the nature of a science, art or trade, as to require a previous habit or experience or study in it in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art or trade to which the question relates are admissible in evidence."<sup>11</sup> Another writer says that "expert opin-

<sup>8</sup> See Black Law Dict. Defined: Doyle v. Manhattan R. Co. 128 N. Y. 488; Nelson v. Johnson, 18 Ind. 329; Linn v. Sigsbee, 67 Ill. 75; Ardisco Oil Co. v. Gilson, 63 Pa. St. 146; Dickenson v. Fitchburg, 13 Gray (Mass.) 546.

<sup>9</sup> 12 Am. & Eng. Ency. of Law (2d ed.) 418. See, also, 37 Am. Law Reg. N. S. 735, et seq. for several suggested definitions.

<sup>10</sup> McKelvey Ev. 183, citing Cain v. Uhlman, 20 Nov. Scot. 148, 153. As examples of subjects of expert testimony as to facts he mentions foreign laws, the physiology of the human body and the condition and operation of its functions, and the meaning of terms peculiar to a certain trade or business.

<sup>11</sup> Rogers Expert Testimony, p. 19. See, also, New York Electric Equipment Co. v. Blair, 79 Fed. 896; Walker v. Bernstein, 43 Ill. App. 568; Hilton v. Mason, 92 Ind. 157; Commonwealth v. Rogers, 7 Met. (Mass.) 500, 41 Am. Dec. 458; Morris v. Farmers Mutual Fire Ins. Co. 63 Minn. 420; Clark v. Baird 9 N. Y. 183; Young v. Johnson, 123 N. Y. 226, 25 N. E. 363; Coyle v. Commonwealth, 104 Pa. St. 117; Cooper v. State, 23 Tex. 331; Naughton v. Stagg, 4 Mo. App. 271; Koccis v. State, 56 N. J. L. 44, 27 Atl. 800; Atchison, &c. R. Co. v. Lawler, 40 Neb. 356; Bruce v. Beall, 99 Tenn. 303.

ion is admissible upon any subject which, in the judgment of the court, will be made clearer by its introduction.”<sup>12</sup> Although, because of the wide discretion of the court in such matters this may be the practical effect of the rule in many instances, yet the statement seems a little too broad. The rule, if not a co-ordinate rule with that excluding opinions generally, is a real exception to that rule, and seems to be based largely upon the same ground as the exception which permits the opinions of ordinary witnesses in certain instances, namely, upon the ground of necessity or supposed necessity in a general sense. That is to say, jurors are not selected with a view to any special knowledge of science, art or trade, but are supposed to be men of ordinary knowledge and understanding, so that when questions requiring peculiar knowledge, experience and study are involved, which ordinary men do not possess or have not had, the jury cannot well determine them without the aid of the opinions of witnesses who, by reason of a special course of training study or experience are peculiarly qualified to give an opinion upon the subject. Such an opinion from such witnesses in such cases is, or should be, helpful to the jury, and is, in a sense at least, a matter of necessity in order to enable the jury to understand the matter and reach a correct conclusion.

**§ 1031 Limits of the rule.**—The ground upon which the rule admitting the opinions of experts is based indicates its limitations. If the matter is such that the jury do not need the aid of opinion evidence, but are competent to understand fully and to draw their own inferences from the facts in evidence without other aid than the instructions of the court, the opinions of experts are inadmissible.<sup>13</sup> Thus, in what may be regarded as a leading case upon the subject, it is said: “Witnesses who are skilled in any science, art, trade or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally

<sup>12</sup> McKelvey Ev. 186.

<sup>13</sup> Stumore v. Shaw, 68 Md. 11, 11 Atl. 360, 6 Am. St. 412; Hurt v. St. Louis, &c. R. Co. 94 Mo. 255, 4 Am. St. 374; Baltimore, &c. R. Co. v. Leonhardt, 66 Md. 77, 78, 5 Atl. 346; Overby v. Railway Co. 37 W. Va. 525, 16 S. E. 813; Enright v.

San Francisco, &c. R. Co. 33 Cal. 230; Sowers v. Duker, 8 Minn. 23; Phillips v. Starr, 26 Iowa, 349; Knoll v. State, 55 Wis. 249, 42 Am. R. 704; Welch v. Franklin Ins. Co. 23 W. Va. 288; Ramadge v. Ryan, 9 Bing. 333, 23 E. C. L. 296; note in 66 Am. Dec. 229.



have not, and are thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. But the opinions of experts cannot be received where the inquiry is into a subject, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them and comprehend them sufficiently for the ordinary administration of justice."<sup>14</sup> It is also said in other cases that the test of admissibility is not whether the matter is common or uncommon,<sup>15</sup> nor whether the witness better understands and appreciates it, but whether it is one of science or skill.<sup>16</sup> But there are matters relating more or less to everyday affairs, rather than to any technical and abstruse science or art, on which ordinary men in the usual walks of life may have

<sup>14</sup> *Ferguson v. Hubbell*, 97 N. Y. 507, 513, 49 Am. R. 544.

<sup>15</sup> *Taylor v. Monroe*, 43 Conn. 36. But if the matter is one of common knowledge, expert evidence is usually inadmissible. *Decatur, &c. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646; *Chicago, &c. R. Co. v. Lewondowski*, 190 Ill. 301, 60 N. E.

497, and cases cited in preceding notes to this section.

<sup>16</sup> *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319; *State v. Watson*, 65 Me. 74; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. R. 544; *Brewster v. Weir*, 93 Ill. App. 588; *Caven v. Bodwell Granite Co.* 97 Me. 381, 54 Atl. 851.

little knowledge and on which the opinions of those who have given them particular study and have special and peculiar skill and experience may be helpful, and in such cases the opinions of such witnesses are frequently admitted as the opinions of experts, although they are not, perhaps, experts in the fullest and most complete sense.<sup>17</sup> In other words, as said in an old case: "The subjects to which this kind of evidence is applicable are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results or trace them to their causes."<sup>18</sup>

§ 1032. **Earliest cases.**—Opinions of experts have been received for several hundred years. Professor Thayer has collected some of the earliest cases. Among them may be mentioned one—in 1353. It was an appeal of mayhem, and the sheriff was ordered to summon skillful surgeons from London to inform the court upon the subject, the court having previously inspected the wound without being able to tell whether it was mayhem or not. In 1493, masters of grammar were sent for to advise what the Latin was for "fine," but they did not greatly aid the court; and in 1665, Sir Thomas Browne, in his capacity as a physician, testified, as an expert, before the jury on the trial of the Suffolk witches.<sup>19</sup> In that case the expert, notwithstand-

<sup>17</sup>Fort Worth, &c. R. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742, 743; Clinton v. Howard, 42 Conn. 294; Chicago, &c. R. Co. v. Price, 97 Fed. 423; Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071; Armstrong v. Railway Company, 45 Minn. 85, 47 N. W. 459; Boyer v. Chicago, &c. R. Co. 103 Iowa, 665, 72 N. W. 780; White v. Farmers' Mut. Fire Ins. Co. 97 Mo. App. 590, 71 S. W. 707. In the case first cited the court says: "Every employment which has a particular class devoted to its pursuit is an art or trade, and persons instructed therein by study or experience may give their opinions." Other instances of the admission of opinions of those who are experts only in this limited sense will be found in the chapter on particular kinds

and classes of experts. Many courts, however, have regarded expert testimony with disfavor and sought to limit the field of its admission. See Tracy Peerage Case, 10 Cl. & Fin. 191; Gregsby v. Clear Lake Water Co. 40 Cal. 396; Doyle v. Manhattan R. Co. 128 N. Y. 488, 499, 28 N. E. 495; O'Neill v. Railroad Co. 129 N. Y. 125, 129, 29 N. E. 84; McNally v. Colwell, 91 Mich. 527, 30 Am. St. 494, 501. See, also, Winans v. New York, &c. R. Co. 21 How. (U. S.) 101, 32 Am. Law Rev. 851.

<sup>18</sup>McFadden v. Murdock, Ir. R. 1 E. C. L. 211.

<sup>19</sup>Thayer Cases, Ev. (2d ed.) p. 673. See, also, for an instance of the court receiving "testimony of physician in 1619." Alsop v. Bowtrell, Cro. Jac. 541. See, also,

ing his great learning, was of the opinion that the accused persons were bewitched.<sup>20</sup>

**§ 1033. Development of law.**—Originally, experts were considered as helpers of the court, but the law gradually developed until they came to be considered as today, that is, as helpers of the jury. "The old conception of a juryman as contrasted with a witness, strictly so called, was that while the witness swore to what he had 'seen and heard,' the juryman swore not merely to that, but to what he knew by way of reasoning and inference. In general, therefore, witnesses, when testifying to juries, could not speak to their opinions any more than to hearsay. But often juries had to be assisted by skilled persons. The furnishing of such assistance to the court was a very ancient thing. It is probable that for a good while after witnesses were regularly allowed before the jury, experts were thought of in the old way as being helpers of the court, and the court instructed the jury upon the points on which such aid was furnished. But at last the modern conception came in, which regards the experts as testifying, like other witnesses, directly to the jury."<sup>21</sup>

**§ 1034. Competency of expert must be established—In general.** Before one can give an opinion as an expert it must be shown to the satisfaction of the court that he is an expert. This may be shown by the testimony of the witness himself by stating his knowledge and his means of acquirement,<sup>22</sup> or it may be shown by the testimony of other witnesses.<sup>23</sup> It is stated in a recent text book that preliminary evidence as to the qualifications of the witness is confined to the testimony of the witness himself.<sup>24</sup> This statement, however, would seem to be erroneous. It is true that the qualifications of an expert witness are usually shown in this way, but, as shown by the authorities cited in the second note to this section, it is not always the only way.

*Buckley v. Thomas*, 1 Plowd. 118;  
*Buller v. Crips*, 6 Mod. 29.

<sup>20</sup> *Trial of Witches*, 6 How. St. Tr. 687, 697. See, also, *Works of Sir Thomas Brown* (Bohn's ed.) vol. 1, liv, lv.; vol. 2, p. 366.

<sup>21</sup> *Thayer Cas. Ev.* (2d ed.) pp. 672, 673. See the early cases of *Trial of Earl of Pembroke*, 6 How. St. Tr. 1310, 1337 (1678); *Rex v. Green*, 7 How. St. Tr. 159 (1679).

<sup>22</sup> *Boardman v. Woodman*, 47 N. H. 120.

<sup>23</sup> *Mason v. Phelps*, 48 Mich. 126; *Wright v. Schnaier*, 70 N. Y. S. 128; *Laros v. Commonwealth*, 84 Pa. St. 200; *State v. McMaynes*, 61 Iowa, 119, 15 N. W. 864. See, also, *Mendum v. Commonwealth*, 6 Rand. (Va.) 704; *Tullis v. Kidd*, 12 Ala. 648.

<sup>24</sup> *McKelvey Ev.* 182.

In one of the cases cited, a third person was permitted to testify that one whose testimony before the grand jury was, by consent, read in evidence on the trial, was a physician. Speaking of the contention of counsel, the court said: "He contends that no evidence of the qualifications of a person to testify as an expert is admissible until the expert himself has been introduced as a witness upon the stand and an opportunity given for cross-examination. But our attention has been called to no case which holds such rule, and we think that none can be found. Any evidence tending to show that the witness called as an expert possesses the requisite knowledge and skill, is, we think, admissible for what it is worth."<sup>25</sup>

**§ 1035. Preliminary examination to determine competency.**—It is necessary, however, that the witness should in some way be shown to be an expert, and there should, ordinarily at least, be a preliminary examination of the witness to determine whether or not he has such knowledge and learning of the particulars or subject matter to qualify him to give an authoritative opinion.<sup>26</sup> The extent and conduct of such preliminary examination are matters largely within the discretion of the trial court.<sup>27</sup> They will be considered in another chapter.

**§ 1036. Competency of expert—Question for judge.**—Whether or not a witness is competent to give an expert opinion is a question of fact for the trial judge. In one case it is said: "While it is settled, as a matter of law, what qualifications are requisite, the possession of those qualifications is equally well settled to be a question of fact, purely within the discretion of the judge before whom the witness is offered. His decision concerning the matter is not subject to revision. It would not be wise to adopt a different rule. The ability or disability of a witness to testify, under the legal requirements for an admission of opinion, is a matter most conveniently and satisfactorily determined at the trial, upon personal examination of the witness. It can, indeed, be determined in no other way."<sup>28</sup> In

<sup>25</sup> *State v. McMaynes*, 61 Iowa, 119, 15 N. W. 864.

<sup>26</sup> *Boardman v. Woodman*, 47 N. H. 120. See, also, *State v. Secrest*, 80 N. Car. 450; *Chicago, &c. R. Co. v. Lambert*, 119 Ill. 255, 10 N. E. 209; *Chicago, &c. R. Co. v. Springfield, &c. R. Co.* 67 Ill. 142; *Sand-*

*wich Mfg. Co. v. Nicholson*, 32 Kans. 666; *Jones v. Tucker*, 41 N. H. 546.

<sup>27</sup> See *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743, where the subject is fully considered.

<sup>28</sup> *Jones v. Tucker*, 41 N. H. 547.

other words, as said by another court: "The rules determining the subjects upon which experts may testify, and prescribing the qualifications of experts, are matters of law; but whether a witness has those qualifications is generally a question of fact to be decided by the trial judge."<sup>29</sup> If the court determines that the subject is a proper one for expert testimony, and that the witness possesses the necessary qualifications, his evidence, unless inadmissible for some other reason, goes to the jury, no matter whether the learning, skill and experience of the expert be comparatively great or comparatively small, but these matters may, of course, affect the weight of his opinion with the jury.<sup>30</sup> The trial judge has also in the first instance to determine whether or not the subject or the question under inquiry is one upon which expert opinion should be introduced, and he then determines whether the witness has the necessary qualifications.<sup>31</sup> If it is shown that the witness has the necessary qualifications, the mere fact that he disclaims being an expert, because of modesty or some unexplained reason, will not prevent the court from finding that he is an expert; so far as expertness is required, and receiving his testimony as that of an expert.<sup>32</sup> So, on the other hand, it has been held that the opinion of the witness that he is qualified is immaterial.<sup>33</sup>

<sup>29</sup> *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56, 62, 14 N. E. 802. See, also, to same effect, *Montana R. Co. v. Warren*, 137 U. S. 348, 353, 11 Sup. Ct. 96; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Teele v. City of Boston*, 165 Mass. 89, 42 N. E. 506; *Gulf City Ins. Co. v. Stevens*, 51 Ala. 121; *Delaware, &c. Co. v. Starrs*, 69 Pa. St. 36; *Davis v. State*, 38 Md. 15; *Bills v. Ottumwa*, 35 Iowa, 107; *Forgey v. First Nat. Bank*, 66 Ind. 123; *McEwen v. Bigelow*, 40 Mich. 215.

<sup>30</sup> It is said by the Supreme Court of the United States: "Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and

if any what, weight is to be given to the testimony. *Spring Co. v. Edgar*, 99 U. S. 645, 658.

<sup>31</sup> *Lincoln v. Barre*, 5 Cush. (Mass.) 590; *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752; *Heald v. Thing*, 45 Me. 392; *Nelson v. Sun Ins. Co.* 71 N. Y. 453.

<sup>32</sup> *Louisville, &c. R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40; *Walker v. Scott*, 10 Kans. App. 413, 61 Pac. 1091; *Crow v. State*, 33 Tex. Cr. R. 264, 26 S. W. 209. So, the interest of an expert affects the weight rather than the competency of his testimony. *New Jersey Zinc, &c. Co. v. Lehigh, &c. Co.* 59 N. J. 189, 35 Atl. 915.

<sup>33</sup> *Boardman v. Woodman*, 47 N. H. 120; *Naughton v. Stagg*, 4 Mo. App. 27. And that it is not provable by reputation. *Adams v. Sullivan*, 100 Ind. 8; *People v. Holmes*, 111 Mich. 364, 69 N. W. 501.

§ 1037. **Whether decision of judge as to competency is reviewable.**—There is some conflict of authority as to whether the decision of a trial judge as to the competency of an expert will be reviewed on appeal.<sup>34</sup> The better opinion would seem to be that it is not reviewable except in cases of a flagrant or clear abuse of discretion;<sup>35</sup> but is reviewable where there is a palpable abuse of discretion, or where there is no evidence whatever tending to prove that the witness is qualified to testify as an expert.<sup>36</sup>

§ 1038. **Expert must have special skill.**—Those testifying as experts must have a special skill, learning or experience in the subject or the matter concerning which they testify. "Matter of opinion," it is said, although, perhaps, too strongly, "is entitled to no weight with a court or jury, unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill or science in such matters as entitles their opinion to pass for scientific truth."<sup>37</sup> The witness must at least have some particular learning, skill or experience, so that his opinion will presumably aid the jury as to a matter which is involved and in regard to which they, as ordinary men of common learning and experience, are not presumed to have the requisite skill, learning or experience to fully comprehend and determine it without such aid.

§ 1039. **How skill of expert may be acquired.**—To be qualified to testify as an expert one should possess the requisite skill, which should have been acquired either from actual study or experience.<sup>38</sup>

<sup>34</sup> See *Hammond v. Schiff*, 100 N. Car. 161; *State v. Cole*, 63 Iowa, 695; *Hill v. Home Insurance Co.* 129 Mass. 345; *Castner v. Sliker*, 33 N. J. L. 96.

<sup>35</sup> *Bemis v. C. V. R. R. Co.* 58 Vt. 636; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. R. 401; *Sorg v. First German, &c. Cong.* 63 Pa. St. 150; *Garr v. Cranney*, 25 Utah, 193, 70 Pac. 853; *Czarecki v. Seattle, &c. Co.* 30 Wash. 288; 70 Pac. 750; *Stevenson v. Ebersole Coal Co.* 203 Pa. St. 316; 52 Atl. 201; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924.

<sup>36</sup> *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 85, 7 N. E. 743; *Southern Life Ins. Co. v. Wilkinson*, 53

Ga. 535; *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338; *Spring Co. v. Edgar*, 99 U. S. 645, 658. See, also, *Louisville, &c. R. Co. v. Frazee*, 24 Ky. 1273, 71 S. W. 437.

But compare *Jones v. Tucker*, 41 N. H. 546; *Bradford Glycerine Co. v. Kizer*, 113 Fed. 894 (determination of trial court conclusive unless already shown to be erroneous in matter of law).

<sup>37</sup> *Carr v. Northern Liberties*, 35 Pa. St. 324. See, also, *Graney v. St. Louis, &c. R. Co.* 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153.

<sup>38</sup> *Perkins v. Stickney*, 132 Mass. 217.

He may testify in a proper case if he has acquired his skill from study without having had any actual practical experience,<sup>39</sup> or if he has acquired his skill from experience and observation without having devoted no time to the study of the subject.<sup>40</sup> So this knowledge may have come to one indirectly; for example: A person following a certain occupation may gain knowledge and experience of another occupation from the fact that the two occupations are so intimately associated. Thus, opinions of builders are received as to the customs of architects,<sup>41</sup> of engineers of stationary engines as to locomotives,<sup>42</sup> and of mail agents as to the running of cars.<sup>43</sup> So, then, the expert may have acquired his knowledge from his own experience<sup>44</sup> or from study and mental training.<sup>45</sup>

**§ 1040. Opportunity for observation alone not sufficient.**—Opportunity for observation of itself is not sufficient to qualify one as an expert; there must be something more, that is, experience or special study. "The rule," it is said, "is that mere opportunity afforded for observation will not constitute one an expert or render his opinion admissible in evidence; he must have been educated in the business about which he testifies, or it must be first shown that he has acquired actual skill and scientific knowledge upon the subject."<sup>46</sup> Observation, and study or experience in similar matters, may, as already shown, be sufficient to qualify; but mere casual observation without any particular study or attention is not sufficient to qualify one as an expert.<sup>47</sup>

<sup>39</sup> *State v. Wood*, 53 N. H. 484; *Siebert v. People*, 143 Ill. 571; *Howard v. Great Western Ins. Co.* 109 Mass. 384; *Castner v. Sliker*, 33 N. J. L. 95, 507. Contra: *Soquet v. State*, 72 Wis. 659.

<sup>40</sup> *Mason v. Fuller*, 45 Vt. 29; *Emrick v. Merriman*, 23 Ill. App. 24; *Slater v. Wilcox*, 57 Barb. (N. Y.) 604.

<sup>41</sup> *Wilson v. Bauman*, 80 Ill. 493.

<sup>42</sup> *Brabbitts v. Chicago, &c. R. Co.* 38 Wis. 289.

<sup>43</sup> *Detroit R. Co. v. Van Steinberg*, 17 Mich. 99.

<sup>44</sup> *Emrick v. Merriman*, 23 Ill. App. 24; *Lincoln v. Barre*, 5 Cush. (Mass.) 590; *Clark v. Bruce*, 12

*Hun* (N. Y.) 274; *Toomes's Estate*, 54 Cal. 309, 35 Am. R. 83.

<sup>45</sup> *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. R. 82; *Caleb v. State*, 39 Miss. 721; *Siebert v. People*, 143 Ill. 571.

<sup>46</sup> *Goldstein v. Black*, 50 Cal. 462.

<sup>47</sup> *Page v. Parker*, 40 N. H. 59; *Haas v. Marshall* 11 Pa. 58, 14 Atl. 421; *Commonwealth v. Farrell*, 187 Pa. St. 408, 41 Atl. 382; *State v. Barrett*, 33 Ore. 194, 54 Pac. 807; *Perkins v. Stickney*, 132 Mass. 217; *Clark v. Bruce*, 12 Hun (N. Y.) 271, 274; *Missouri Pac. R. Co. v. Finley*, 38 Kans. 550; *People v. Millard*, 53 Mich. 63.

**§ 1041. Subjects of general knowledge.**—The subject to be one of expert opinion, as already indicated, must be one in which a juror is not as competent to form an opinion as the expert witness. "Upon subjects of general knowledge, which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the jury must form their opinions. In such cases the testimony of witnesses, as experts merely, is not admissible."<sup>48</sup> As stated in a recent case, and as already shown, "there is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts; or, stated in other words, if the relation of the facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury."<sup>49</sup>

**§ 1042. Inferences in province of jury.**—The expert is not allowed to give an opinion that is really an inference in the province of the jury.<sup>50</sup> Thus, in an action to recover damages for injuries received by one who slipped on a piece of glass forming a part of the sidewalk, the question arose as to whether an expert, as an architect, should be permitted to give his opinion that such glass so used was unsafe to passers-by, and the court said: "The present case is supposed to come within the exceptions to the rule that on the questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called experts, are permitted to give their opinions in evidence. But this is on the ground of necessity, where the facts in issue are not themselves accessible by evidence, and it is a matter of necessity to call in the experience or instructed opinion of such witnesses. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. Why was not the glass here safe?"

<sup>48</sup> *Concord R. Co. v. Greely*, 23 N. H. 237. See, also, *State v. Moore*, 52 La. Ann. 605, 26 So. 1001.

<sup>49</sup> *Stumore v. Shaw*, 68 Md. 11, 11 Atl. 360, 6 Am. St. 412, 415. See ante § 1031.

<sup>50</sup> *Commissioners of Big Lake Drainage Dist. v. Com'rs*, 199 Ill. 132, 64 N. E. 1094; *Treat v. Merchants' Life Ass'n*, 198 Ill. 431, 64

N. E. 992; *McGibbons v. McGibbons*, 90 Iowa, 201, 93 N. W. 55; *Hunt v. Kile*, 98 Fed. 49; *Schneider v. Second Ave. R. Co.* 133 N. Y. 583, 587, 589, 30 N. E. 752; *Newton v. Fordham*, 7 Hun (N. Y.) 59. But all authorities do not accept this without qualification. For full consideration see ante vol. 1, § 674, and post § 1045.



Because of the slipperiness of its surface, especially when there was but little snow upon it. The question whether the glass was unsafe by reason of the two great smoothness or slipperiness of its surface was not a question of science or skill. The decision of that question required no special knowledge, and it was easily determinable by the jury upon a sufficient description of facts pertaining to the glass and the use of it in a sidewalk, being given by the witnesses. We do not perceive why mere proof of the naked facts could not enable the jury themselves to draw the inference whether the glass was safe or unsafe. The real question for the jury was not whether the glass was safe, but whether it was reasonably safe. The not improbable effect of obtruding upon the jury the opinion of these architects that the glass was unsafe, might be that the jury would regard them as deciding the whole question and so accept them, and repose on them as such without further inquiry and deciding for themselves whether the sidewalk might not have been reasonably safe."<sup>51</sup>

**§ 1043. Questions of ethics.**—The opinions of witnesses as to questions of ethics are inadmissible. This principle of law is clearly brought out in an insurance case, where it was attempted to prove by witnesses that a certain person, if sane, would not have taken his own life.<sup>52</sup> The court say: "The opinions of witnesses not founded on science, but as a mere theory of morals or ethics, whether given by professional or unprofessional men, are wholly inadmissible as evidence. Hence, the opinion even of physicians that no sane man in a Christian country would commit suicide, not being founded on a science or phenomena of the mind, but rather a theory of morals, religion and future responsibility, is not evidence."<sup>53</sup>

**§ 1044. Questions of law.**—Experts are not allowed to give their opinions on a question of law,<sup>54</sup> except where it is as to a foreign

<sup>51</sup> *City of Chicago v. McGiven*, 78 Ill. 347.

<sup>52</sup> *St. Louis Mutual Insurance Co. v. Graves*, 6 Bush. (Ky.) 288.

<sup>53</sup> See, also, *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 296; *Grand Rapids, &c. R. Co. v. Ellison*, 117 Ind. 234; *Missouri Pac. R. Co. v. Mackey*, 33 Kans. 299; *Nowel v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Allen v. Burlington, &c. R. Co.* 57 Ia. 623.

<sup>54</sup> *Quincy Gas, &c. Co. v. Bauman*, 104 Ill. App. 600, affirmed in 67 N. E. 807; *Lee v. Breezly*, 54 Iowa, 660; *Gaylor's Appeal*, 43 Conn. 82; *Fuller v. Metropolitan, &c. Ins. Co.* 70 Conn. 647, 41 Atl. 4. An expert should not be permitted to state a legal conclusion under the guise of giving testimony. *Travelers' Ins. Co. v. Thornton*, 107 Ga. 584, 46 S. E. 678.

law or the like as a question of fact. Thus, the opinion of an expert in insurance matters as to his understanding of a contract of insurance is not admissible.<sup>55</sup> The court in deciding the above proposition said: "The meaning and legal effect of the policy and of the document claimed as referred to by the policy was a question of law for the court. Experts may be called to define works of art, to explain the principles of their science, where such principles are necessary to be understood; to state the condition and practice of their business, when material; but not to instruct the court as to the meaning of a contract. Sometimes a definition of a term or explanation of a principle may be decisive of the meaning of a document, but it is for the court to draw the conclusion; the opinion of any one else is immaterial."

**§ 1045. Other expert testimony frequently offered but inadmissible.**—Experts are frequently asked for their opinions concerning matters such as the following, but their opinions on such matters have been held inadmissible: as to whether an act amounts to negligence,<sup>56</sup> whether a certain thing is necessary or not,<sup>57</sup> as to what is the proximate cause of an injury,<sup>58</sup> as to whether a certain thing is fair,<sup>59</sup> and as to mere abstract questions of science.<sup>60</sup> So; ordinarily, opinions are not admissible concerning the following matters: As to whether a certain place is safe or dangerous,<sup>61</sup> and as to the measure of damages.<sup>62</sup> The main objection to the admission of such

<sup>55</sup> *Lindauer v. Delaware Mutual Insurance Co.* 13 Ark. 462.

<sup>56</sup> *Bills v. Ottumwa*, 35 Iowa, 107; *Ballard v. N. Y. & C. R. Co.* 126 Pa. St. 141.

<sup>57</sup> *Enright v. Railroad Co.* 33 Cal. 230; *Amstein v. Gardner*, 134 Mass. 4, 10.

<sup>58</sup> *Milwaukee, & C. R. Co. v. Kellogg*, 94 U. S. 469.

<sup>59</sup> *Reid v. Ladue*, 66 Mich. 22.

<sup>60</sup> *Champ v. Commonwealth*, 2 Met. (Ky.) 18. But a statement that gas factories are known, as a matter of science, to have rendered neighborhoods exempt from cholera, yellow fever, and the like, has been held admissible in a proper case in which it was material. *Emerson v. Low-*

*ell Gaslight Co.* 6 Allen (Mass.) 146.

<sup>61</sup> *Topeka v. Sherwood*, 39 Kans. 690; *Couch v. Charlote, & C. R. Co.* 22 S. Car. 557; *King v. Missouri, & C. R. Co.* 98 Mo. 235, 11 S. W. 563; *Way v. Illinois Central R. Co.* 40 Iowa, 341. But compare *Taylor v. Town of Monroe*, 43 Conn. 36; *Cross v. Lake Shore, & C. R. Co.* 69 Mich. 363; *Albert v. The State*, 66 Md. 325, 7 Atl. 697; *Anderson v. Fielding* (Minn.), 99 N. W. 357; *Punkowski v. New Castle, & C. Co.* (Del.), 57 Atl. 559.

<sup>62</sup> *Bain v. Cushman*, 60 Vt. 343; *Norman v. Wells*, 17 Wend. (N. Y.) 136; and numerous authorities cited in note in 22 Am. Law Reg. N. S. 334.

opinions is that considered in discussing the subject of opinion evidence in the first volume of this work, namely, that they invade the province of the jury and undertake to determine the ultimate or exact issue. A few courts, however, as there shown, do not regard this objection as necessarily fatal to the admission of the opinion.

**§ 1046. Effect of expert opinion.**—The effect of expert testimony or opinion rests entirely with the jury,<sup>63</sup> and the jurors may apply their own experience and knowledge and exercise their own independent judgment upon the facts in evidence in reaching their conclusion.<sup>64</sup> “Such testimony,” it is said, “must have its legitimate influence by enlightening, convincing, and governing the judgment of the jury. The jury cannot be required by the court to accept, as a matter of law, the conclusions of the witnesses instead of their own.”<sup>65</sup> Many courts and text writers have pointed out the danger of giving too much effect to expert evidence, but it is a matter that is left in most jurisdictions to the jury to determine its effect along with the other evidence.<sup>66</sup>

**§ 1047. Value and weight of expert opinion—Instructions.**—It is frequently said that expert opinions<sup>67</sup> should be weighed by the jury with caution,<sup>68</sup> for it often happens that the expert is prejudiced or biased in favor of the side by whom he was called. Thus, in one case it is said: “The evidence of witnesses who are brought upon the stand to support a theory by their opinions is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others; and they are selected on account

<sup>63</sup> *Johnson v. Thompson*, 72 Ind. 167; *Ponnell v. Commonwealth*, 86 Pa. St. 260; *Howard v. Providence*, 6 R. I. 514, 516.

<sup>64</sup> *Head v. Hargrave*, 105 U. S. 45; *Nyback v. Champagne Lumber Co.* 109 Fed. 732. But see *Wood v. Barker*, 27 Am. Law Reg. N. S. 323.

<sup>65</sup> *Anthony v. Stinson*, 4 Kans. 221.

<sup>66</sup> For criticisms on expert evidence see the following:

*People v. Morrigan*, 29 Mich. 4; *Winans v. New York, &c. R. Co.* 21 How. (U. S.) 101; *State v. Watson*,

65 Me. 74; *Heald v. Thing*, 45 Me. 392, 32 Am. Law Rev. 851, 853, 11 Harvard Law Rev. 169.

<sup>67</sup> See the following articles: 66 Am. Dec. 228; 5 Am. Law Rev. 227; 4 Cr. Law Mag. 565; 32 Am. Law Reg. 529; 48 Albany Law Jour. 404.

<sup>68</sup> *People v. Morrigan*, 29 Mich. 48; *Daniels v. Foster*, 26 Wis. 686, 693; *Grigsby v. Clear Lake Water Co.* 40 Cal. 396, 405; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Gurney v. Longlands*, 5 Barn. & Ald. 330.

of their ability to express a favorable opinion, which there is great reason to believe, is in many instances the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict, and it forms a very proper subject for the expression of a reasonably guarded opinion by the court.<sup>69</sup> Again, a conviction of perjury in giving an expert opinion is almost an impossibility, and, at most, such testimony is opinion and consists of conclusions and deductions rather than facts. But it is said that when experts testify as to precise facts in science, as ascertained, their testimony is very valuable,<sup>70</sup> and it has been held that it is error to instruct the jury that they may disregard the opinions of experts and use their own judgment.<sup>71</sup> The better rule, and that which seems to be supported by the weight of authority, is that the opinions of experts are not conclusive,<sup>72</sup> at least where there is other evidence from which a contrary conclusion may be legitimately drawn; nor, on the other hand, are they necessarily entitled to less weight than other evidence, and it is error to instruct the jury that they are entitled to less weight and must be received with caution.<sup>73</sup> They are, in general, to be received and

<sup>69</sup> *Templeton v. People*, 3 Hun (N. Y.) 357.

<sup>70</sup> *Gay v. Union Ins. Co.* 9 Blatchf. (U. S.) 142; *Tinney v. New Jersey, &c. Co.* 12 Abbott's Pr. N. S. (N. Y.) 1; *Flynt v. Bodenhamer*, 80 N. Car. 205.

<sup>71</sup> *Wood v. Barker*, 22 Am. Law Reg. (U. S.) 323. See, also, *City of Kansas v. Hill*, 80 Mo. 523; *Washburn v. Railroad*, 59 Wis. 364. But see authorities cited in notes to last preceding section.

<sup>72</sup> *Tatum v. Mohr*, 21 Ark. 349, 355; *Watson v. Anderson*, 13 Ala. 202; *Chandler v. Barrett*, 21 La. Ann. 58; *Goodwin v. State*, 96 Ind. 550 (nor necessarily entitled to great weight); *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510; *Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172; *Stone v. Chicago, &c. R. Co.* 66 Mich. 76, 33 N. W. 24. See also *Sanders v. State*, 94 Ind. 147; *United States v. Molloy*, 31 Fed. 19; *Ward*

*v. Brown*, 53 W. Va. 227, 44 S. E. 488; *Hoyberg v. Henske*, 153 Mo. 63, 55 S. W. 83; *Baxter v. Chicago, &c. R. Co.* 104 Wis. 307, 80 N. W. 644.

<sup>73</sup> *Eggers v. Eggers*, 57 Ind. 461; *Cuneo v. Bessoni*, 63 Ind. 524; *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902; *Carter v. Baker*, 1 Sawyer (U. S. C. C.) 512, 525; *Louisville, &c. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890; *State v. Johnson*, 66 S. Car. 23, 44 S. E. 58; *In re Blake's Estate*, 136 Cal. 306, 68 Pac. 827; *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. 334, 38 L. R. A. 721; *Mannack v. Mayor*, 53 Ga. 162; *Atchison, &c. R. Co. v. Thul*, 32 Kans. 255, 49 Am. R. 484. See, also, *Railroad Co. v. Malone*, 109 Ala. 509, 20 So. 33; *City of Kansas City v. Hill*, 80 Mo. 523; *Bever v. Spangler*, 93 Ia. 576, 61 N. W. 1072; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40; 87

weighed by the jury like other evidence. Some courts, however, have held that it is not error to instruct that they are not entitled to the same weight or that they should be received with caution.<sup>74</sup> It has also been held proper, where the opinion of a medical expert is based on a hypothetical question, to instruct the jury that if the assumed facts, or any of them, are not true, the opinion should be rejected;<sup>75</sup> but it would seem that such an instruction would be too broad, at least in some cases.<sup>76</sup>

Am. St. 228; *State v. McCullough*, 114 Iowa, 532, 87 N. W. 503, 89 Am. St. 382; *Weston v. Brown*, 30 Neb. 609, 46 N. W. 826; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326.

<sup>74</sup>*United States v. Pendergast*, 32 Fed. 198, 200; *Newton v. State*, 21 Fla. 56, 102; *Templeton v. People*, 3 Hun (N. Y.) 357, affirmed in 60 N. Y. 643; *Whitaker v. Parker*, 42 Iowa, 586; *People v. Niles*, 44 Mich. 606. See, also, *Highfill v. Missouri Pac. R. Co.* 93 Mo. App. 219; *Bateman v. Ryder*, 106 Tenn. 712, 64 S. W. 48; *Hoyberg v. Henske*, 153 Mo. 63, 55 S. W. 83. In one case the testimony of an alleged expert was so

absurd that it was held that it should not be considered. *Haviland v. Kansas City, &c. R. Co.* 172 Mo. 106, 72 S. W. 515. See, also, *Watts v. State* (Md.), 57 Atl. 542.

<sup>75</sup>*Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97; *Trumbull v. Richardson*, 69 Mich. 400, 420. See, also, *Woodward v. Iowa Life Ins. Co.* 104 Tenn. 49, 56 S. W. 1020; *Loucks v. Chicago, &c. R. Co.* 31 Minn. 526; *Forsyth v. Doolittle*, 120 U. S. 73, 77, 7 Sup. Ct. 408; *Kirsher v. Kirsher*, 120 Iowa, 337, 94 N. W. 846.

<sup>76</sup>See *People v. Benham*, 160 N. Y. 402, 55 N. E. 11; *Epps v. State*, 102 Ind. 539.

## CHAPTER L.

### KINDS AND CLASSES OF EXPERTS.

Sec.	Sec.
1048. Generally.	1061. Farmers.
1049. Various occupations and professions—In general.	1062. Gardeners.
1050. Where occupation has been abandoned.	1063. Horsemen and Breeders.
1051. Opinions as to value of services.	1064. Lawyers.
1052. Presumption that experts understand matters pertaining to their own business or profession.	1065. Lumbermen.
1053. Accountants and actuaries.	1066. Machinists.
1054. Architects.	1067. Masons.
1055. Bankers.	1068. Merchants and manufacturers.
1056. Builders.	1069. Millers and millwrights.
1057. Carpenters.	1070. Miners.
1058. Chemists.	1071. Nautical men.
1059. Engineers—Civil.	1072. Photographers.
1060. Engineers—other than civil.	1073. Railroad men.
	1074. Surveyors.
	1075. Veterinary surgeons.
	1076. Well diggers and drivers.
	1077. Miscellaneous.

§ 1048. **Generally.**—Expert witnesses may, in a rough way, be divided into two general classes, the professional and the non-professional. The former may be considered as experts in the fullest sense, and the latter may also be considered as experts in so far as expertness is required in regard to a particular subject in order to render their opinions admissible as expert opinions. A physician called to testify as to the nature of a wound and permanency of the injury or the like, is a type of the professional class, and a farmer called to testify as to the proper method of curing hay, or the like, may

fairly be considered as a type of the non-professional class.<sup>1</sup> This classification may be of little practical use, but it emphasizes the fact that an expert, within the meaning of the rule admitting the opinion of experts on certain subjects, is not necessarily a professional man or a scientist in the strict sense.

**§ 1049. Various occupations and professions—In general.**—Persons skilled through special study or experience in certain occupations and professions may give expert testimony as to matters concerning which they are specially skilled through their vocations. Some of those that are most frequently called upon for expert opinions are considered in the following sections. It should be borne in mind, however, that the opinions of such persons are not admissible in all cases nor on all subjects, and that the admissibility of such opinions is determined, in general, by the rules stated in the last preceding chapter. Attention will first be called to some general consideration relating to the particular subject; the various kinds of experts classified according to their general occupations will next be treated under an alphabetical arrangement, and sub-classes, or those engaged in particular and limited pursuits will then be considered in alphabetical order in a section on miscellaneous occupations and classes. The important subject of the opinions of medical experts, including physicians and surgeons, is reserved for another chapter. "Persons are supposed to understand questions appertaining to their own profession, and hence their opinion in reference thereto is evidence. It is not conclusive of the facts stated and may be shown to be incorrect; but such opinion is competent evidence to be received and considered by the jury in connection with other proof."<sup>2</sup> So, it may happen that experience in one department of trade, science or art, may qualify a witness to give an expert opinion as to a similar matter in some other department, and it has even been stated, in the form of a rule, that "an expert in one department of trade, science or art may testify upon matters arising in any other, where his experience in the one department has given him special opportunity for observation and knowledge in the other."<sup>3</sup>

<sup>1</sup> See 2 Elliott's Gen. Pr. § 651. (2d Ed.) p. 255. See also Mc-

<sup>2</sup> Jones v. White, 11 Hump. Ewen v. Bigelow, 40 Mich. 215; (Tenn.) 268. Barnes v. Ingalls, 39 Ala. 198; Dole

<sup>3</sup> Lawson Exp. and Opin. Ev. v. Johnson, 50 N. H. 452.

§ 1050. **Where occupation has been abandoned.**—At the time of giving his testimony in a matter within a certain occupation the witness need not be following the same calling, but may have abandoned it for another.<sup>4</sup> But it may have been so long since he was engaged in the same or a similar occupation, and the other circumstances may be such that the court may well decline to permit him to testify as an expert on the particular subject.<sup>5</sup>

§ 1051. **Opinions as to value of services.**—In all the vocations qualified experts may give their opinions in a proper case concerning the value of services in their respective vocations. The value of services in a special calling is, to some extent at least, a matter of special knowledge. In one case, where the question arose as to the value of an attorney's services, the court, in holding that the opinions of others in the same profession were admissible, says this: "The question is one upon which, from the nature of the case, it is not practicable to furnish more definite evidence than the opinion of witnesses who show themselves qualified to form well grounded estimates of such value by their familiarity with the department of business in which such services have been rendered. Services performed by members of the legal profession in conducting litigation fall, we think, within this principle. There is no fixed standard by which their value can be determined; their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. The experience and knowledge of ordinary jurymen do not qualify them to form an opinion as to the value of services of this kind; the case is not one where the opinions of witnesses should be excluded because they are no better than the opinions of the jurymen themselves. On the other hand, practicing lawyers occupy the position of experts as to questions of this nature; from the character of their business they are not only in the habit of estimating the value of professional services, but they enjoy peculiar advantages for so doing; their opinions of such value should therefore be received, not only because they are qualified to

<sup>4</sup> Bearss v. Copley, 10 N. Y. 93;  
Vanderdoucht v. Thelusson, 8 Man.

<sup>5</sup> McEwen v. Bigelow, 40 Mich.  
215.

G. & S. (65 Eng. C. L.) 812.



form them, but because it appears to be impracticable to furnish any more satisfactory evidence.”<sup>6</sup> There are some cases, however, in which it is said that the value of professional services is not to be proved by expert testimony, and that the jurors can use their own knowledge and experience to determine the question.<sup>7</sup> Certainly such opinions are not conclusive upon the jury where there is conflicting evidence clearly showing the opinions to be worthless or erroneous, and many decisions go even farther in this direction.<sup>8</sup>

**§ 1052. Presumption that persons understand matters pertaining their own business or profession.**—Other matters, as well as the value of services in the particular occupation of the witness, may come within the scope of their knowledge and experience as experts. Indeed, it has been said that persons are presumed to understand questions pertaining to their own business or profession;<sup>9</sup> and a dealer in any particular kind of articles is generally presumed to have sufficient knowledge of the value of such articles to qualify him to testify on that question.<sup>10</sup> So, within limits, persons may be presumed to understand the ordinary duties and practice in the particular occupation in which they are engaged. But it is not entirely clear as to how far such presumptions should be indulged in determining the competency of a witness as an expert where nothing more is shown. Suppose, for instance, that it is merely shown that the witness is a phy-

<sup>6</sup> *Allis v. Day*, 14 Minn. 516. See, also, *Shirk v. Brookfield*, 79 N. Y. S. 223, 225; *Bosard v. Powell*, 79 Mo. App. 184; *McClellan v. Duncombe*, 65 N. Y. S. 19; *McCollum v. Seward*, 62 N. Y. 316; *McKnight v. Detroit, &c. R. Co.* 131 Mich. 376, 97 N. W. 772.

<sup>7</sup> *Walker v. Cook*, 33 Ill. App. 561; *Head v. Hargrave*, 105 U. S. 45. It is almost universally conceded that such evidence is admissible in a proper case, but whether it is to be considered as expert evidence on a subject not within the knowledge and experience of ordinary men, is a question upon which the conflict arises. Opinion evidence, although not strictly expert evidence, is sometimes admissible in

such cases as in cases of value generally.

<sup>8</sup> *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1173; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510. See, also, *Lincoln Land Co. v. Phelps County*, 59 Neb. 249, 80 N. W. 818; *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973.

<sup>9</sup> *Jones v. White*, 11 Humph. (Tenn.) 268.

<sup>10</sup> *Lawton v. Chase*, 108 Mass. 238; *Luse v. Jones*, 39 N. J. L. 708; *Cautling v. Hannibal, &c. R. Co.* 54 Mo. 385; *Johnson Harvester Co. v. Clark*, 31 Minn. 165; *Hinckley v. Kersting*, 21 Ill. 247.

sician, an attorney at law, an engineer, a bricklayer, or the like. Is this sufficient to qualify him to speak as an expert on matters ordinarily appertaining to the business or profession of the witness? He may, perhaps, have made no previous study of the matter and may have just entered upon the practice of his profession or business and have had no experience therein. If it further appears that he has been engaged for a considerable time in such practice, he would doubtless be competent in a proper case. But the presumption should not, in any event, be carried too far.<sup>11</sup> Thus, for instance, a brakeman cannot be presumed to know all about every branch of railroading. There are some cases in which the presumption of qualification has been indulged in favor of professional men, such as physicians and attorneys at law;<sup>12</sup> and under the rule leaving so much to the discretion of the court it may be that it would not be reversible error to permit a physician or an attorney at law to testify as an expert in a proper case, although nothing more might be shown as to his qualifications than that he was a practicing physician or an attorney at law. But the court should have some evidence to act on,<sup>13</sup> and it is proper and customary for the trial court to require a further showing of qualifications than the mere statement that the witness is engaged in a certain business or profession.

§ 1053. **Accountants and actuaries.**—Accountants may give their opinions as to the value of the services of one likewise engaged.<sup>14</sup> So,

<sup>11</sup> See *Paducah St. R. Co. v. Graham*, 15 Ky. L. R. 748; *Lorsch v. United States*, 119 Fed. 476; *Otey v. Hoyt*, 2 Jones, L. (47 N. Car.) 70; *State v. Simmons*, 39 Ore. 111, 65 Pac. 595; *Stennett v. Pennsylvania Fire Ins. Co.* 68 Iowa, 674, 28 N. W. 12.

<sup>12</sup> See *Washington v. Cole*, 6 Ala. 212; *Consolidated, &c. Co. v. Casnow*, 41 Md. 59 (attorney); *State v. McMaynes*, 61 Ia. 119, 15 N. W. 864; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924. See, also, *Bearss v. Copley*, 10 N. Y. 93; *Ashe v. Lanhams*, 5 Ind. 435. But compare *Polk v. State*, 36 Ark. 117.

<sup>13</sup> *Fry v. Estes*, 52 Mo. App. 1. See

also, *Polk v. State*, 36 Ark. 117. In *State v. Simons*, 39 Ore. 111, 65 Pac. 595, 596, a physician was permitted to testify on the subject of poisoning, without any other evidence of qualification than that he was a licensed and practicing physician, and the court on appeal held that this was error, and said: "His competency, therefore, was not determined by the court as a question of fact, which determination, under many of the authorities, would not be reviewable on appeal, unless an abuse of discretion was clearly shown."

<sup>14</sup> *Shattuck v. Train*, 116 Mass. 296.

they are competent to testify as to errors in an assessment book,<sup>15</sup> and as to the results of the computations from the books and schedules of the assets and debts of a party, the same having been put in evidence.<sup>16</sup> Such matters as the last are more in the nature of matters of fact rather than mere opinions, and it was observed by the court in the last case cited that the witness did not state deductions and inferences of his own judgment, but did state results of computations. In another case, however, an accountant, who had been a bookkeeper and teller in a bank, was held competent to testify to handwriting by comparison.<sup>17</sup> Actuaries, when experienced in the life insurance business, are competent to testify as to the value of an annuity.<sup>18</sup> So they have been held competent to testify to the present value of a life insurance policy,<sup>19</sup> as to whether a temporary policy had expired,<sup>20</sup> and as to the probable duration of a person's life.

§ 1054. **Architects.**—Among the many matters upon which architects as experts may give their opinions, the following may be mentioned as having been decided: They may express their opinion that the work done on a building was performed in compliance with the contract.<sup>21</sup> As to what caused a building to collapse,<sup>22</sup> whether a cellar would be air-tight if constructed according to certain specifications,<sup>23</sup> as to the effect of the collapse of a structure,<sup>24</sup> and as to the construction, strength and sufficiency of buildings.<sup>25</sup> As said in

<sup>15</sup> *Timberlake v. Brewer*, 59 Ala. 112.

<sup>16</sup> *Jordan v. Osgood*, 109 Mass. 457, 12 Am. R. 731. See, also, *Frick v. Kabaker*, 116 Iowa, 494, 90 N. W. 498.

<sup>17</sup> *Hadcock v. O'Rourke*, 25 N. Y. S. 55.

<sup>18</sup> *Rowley v. London, &c. R. Co.* L. R. 8 Exch. 221.

<sup>19</sup> *Price v. Insurance Co.* 48 Mo. App. 281.

<sup>20</sup> *Greenfield v. Massachusetts, &c. Insurance Co.* 47 N. Y. 430.

<sup>21</sup> *Tucker v. Williams*, 2 Hilton (N. Y.) 562. See, also, *Behsmann v. Waldo*, 78 N. Y. S. 1108. But not always. *Zimmerman v. Conrad*, 71 Mo. App. 477, 74 S. W. 139.

<sup>22</sup> *Quigley v. Manufacturing Co.* 50 N. Y. S. 98.

<sup>23</sup> *MacKnight & Flintic Stone Co. v. New York*, 43 N. Y. S. 139.

<sup>24</sup> *Ringlehaupt v. Young*, 55 Neb. 128, 17 S. W. 710. In this case the opinion of another architect or builder was excluded because he had no personal knowledge and was not asked a hypothetical question.

<sup>25</sup> *Turner v. Hoar*, 114 Mo. 335, 336, 21 S. W. 737. But it is also held in the same case that where a matter could be fully got before the jury by direct proof so that they could fully understand it, expert opinion as to that particular matter was inadmissible. See, also, *Graham v. Pennsylvania Co.* 139 Pa. St. 161.

the last case just cited: "Architects and builders are well known as persons engaged, as a business, in planning, constructing, remodeling, and adapting to particular uses, buildings and other structures; and, if their experience and observation are sufficient, they may be regarded as being especially skilled in that business, and qualified, *prima facie*, to testify as experts." It has also been held that architects and builders may testify as to the value of houses and depreciation in value resulting from a nuisance.<sup>26</sup> And in still another case it was held that they might testify as to how long a period of time would be necessary to remove certain debris.<sup>27</sup>

**§ 1055. Bankers.**—Bankers and bank tellers may state opinions as experts as to the genuineness of a treasury note,<sup>28</sup> as to the alteration of a date,<sup>29</sup> as to whether a signature is in a natural or feigned hand,<sup>30</sup> as to the value of the assets of an insolvent bank,<sup>31</sup> as to whether a note is a rediscounted note,<sup>32</sup> and, if judges of counterfeit money, may give expert testimony as to the spuriousness of bank notes,<sup>33</sup> or the genuineness of a stolen bank note.<sup>34</sup> They are experts as to handwriting if they have acquired skill as to signatures to notes and checks,<sup>35</sup> and may aid the jury by comparison of handwriting in a proper case.<sup>36</sup>

**§ 1056. Builders.**—Builders may give opinions as to matters concerning their trade. Thus, it has been held that they may state their opinion as to the effect of heat on mortar and brick in walls of burned buildings,<sup>37</sup> whether a certain house is a brick house,<sup>38</sup> as to

<sup>26</sup> *Gaintlet v. Whitworth*, 2 C. & K. 720.

<sup>27</sup> *Chamberlain v. Dunlap*, 8 N. Y. S. 125.

<sup>28</sup> *Atwood v. Cornwall*, 28 Mich. 336.

<sup>29</sup> *Nelson v. Johnson*, 18 Ind. 329.

<sup>30</sup> *Lyon v. Lyman*, 9 Conn. 60.

<sup>31</sup> *State v. Sattley*, 131 Mo. 471.

<sup>32</sup> *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628.

<sup>33</sup> *May v. Dorsett*, 30 Ga. 116; *Atwood v. Cornwall*, 28 Mich. 339; *Hess v. Ohio*, 5 Ohio, 6, 22 Am. Dec. 767; *Kirksey v. Kirksey*, 41 Ala. 626.

<sup>34</sup> *Keating v. People*, 160 Ill. 480, 43 N. E. 724.

<sup>35</sup> *Speiden v. State*, 3 Tex. App. 159, 30 Am. R. 126; *Dubois v. Baker*, 30 N. Y. 355; *Forgey v. First Nat. Bank*, 66 Ind. 123; *Lyon v. Lyman*, 9 Conn. 59; *Pate v. People*, 3 Gilman (Ill.), 644; *Bradford v. People*, 20 Colo. 157, 43 Pac. 1013.

<sup>36</sup> *People v. Fletcher*, 60 N. Y. S. 777; *Speiden v. State*, 3 Tex. App. 156, 30 Am. R. 126; *Tower v. Whip*, 63 L. R. A. 937, and note.

<sup>37</sup> *Dixon v. Wachenheimer*, 6 Ohio Cir. Dec. 380.

<sup>38</sup> *Mead v. Northwestern Insurance Co.* 7 N. Y. 530. Ordinarily, however, this would seem a matter of common knowledge.

what is included in the employment of one to make plans and designs for a building,<sup>39</sup> as to how a cornice should be placed.<sup>40</sup> So, it has been held that a mill builder may state his opinion as to whether the placing of two wheels in a flouring mill was well done.<sup>41</sup> So a builder may give his opinion as to whether the walls of a building were sufficient to sustain it,<sup>42</sup> also as to the strength of the floor and joists of a grand stand,<sup>43</sup> and the effect that a knot or cross-grain has upon the strength of a piece of timber.<sup>44</sup> And, in a recent case, although a builder saw only the exterior of a building, was permitted to give his opinion as to what it was worth to build it.<sup>45</sup> A similar ruling was made where a contractor, having special knowledge of the cost of constructing buildings, saw only the plans and specifications.<sup>46</sup> The opinions of bridge builders as to matters of technical skill in their vocations are admissible; thus, they testify as to the effect of loosening a brace on a bridge,<sup>47</sup> as to whether a bridge was properly constructed,<sup>48</sup> and as to meaning of "iron bridge" when nothing is stipulated as to joists;<sup>49</sup> and it has also been held that persons experienced as contractors in railroad building may testify as experts that, but for delays shown to have been caused by the railroad company, the work contracted for could have been completed within the time fixed in the contract.<sup>50</sup>

§ 1057. **Carpenters.**—Carpenters may give their opinions in evidence as to matters of technical skill in their trade. They are competent to testify as to the period of time necessary for completing certain carpenter work,<sup>51</sup> that a hardwood floor becomes slippery by use,<sup>52</sup> as to whether certain cross-arms for telephone poles are well

<sup>39</sup> *Wilson v. Bauman*, 80 Ill. 493.

<sup>40</sup> *Haver v. Tenney*, 36 Iowa, 80.

<sup>41</sup> *Cole v. Clark*, 3 Wis. 292.

<sup>42</sup> *Continental Insurance Co. v. Pruitt*, 65 Tex. 125.

<sup>43</sup> *Fox v. Buffalo Park*, 21 N. Y. App. Div. 331. But see *Thompson v. City of Worcester*, 182 Mass. 321, 68 N. E. 833.

<sup>44</sup> *Boettger v. Scherpe, &c.* 124 Mo. 87.

<sup>45</sup> *O'Keefe v. Corporation of St. Francis' Church*, 59 Conn. 551, 22 Atl. 325.

<sup>46</sup> *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 586.

<sup>47</sup> *Bettys v. Denver Tp.* 115 Mich. 228, 73 N. W. 138.

<sup>48</sup> *Cobb v. Railroad Co.* 149 Mo. 609, 50 S. W. 894.

<sup>49</sup> *White v. Town of Ellisburg*, 45 N. Y. S. 1122.

<sup>50</sup> *Louisville, &c. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153.

<sup>51</sup> *Stiles v. Neillsville Milling Co.* 87 Wis. 266, 58 N. W. 411.

<sup>52</sup> *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

made,<sup>53</sup> as to what it was reasonably worth to put certain lumber into buildings,<sup>54</sup> as to the nature and character of hemlock,<sup>55</sup> as to the value of a building, upon a description being given of the interior,<sup>56</sup> as to the value of lumber in a particular house,<sup>57</sup> that a wall though a little out of plumb is as valuable and accomplishes the purpose for which it was built,<sup>58</sup> as to the value of a house destroyed by fire,<sup>59</sup> and as to the value of the services of carpenters and joiners.<sup>60</sup> So a carpenter may testify as an expert as to the safety of an elevator,<sup>61</sup> and as to a device used in connection with an elevator.<sup>62</sup> So, also, a carpenter and joiner who had worked for a street railway company part of the time making turn-tables was a competent witness as to the safety of a certain turn-table.<sup>63</sup> Likewise the opinion of a ship carpenter as to the safety of a ship has been received.<sup>64</sup> But, in a recent case, although one who was a carpenter and builder, with special experience in the construction of coal stages, was held competent to testify as to the proper method of constructing certain parts of the wood work of the stage, he was held incompetent to testify as an expert in regard to the strength of wire cables and how many pounds a piece of iron rigging of a certain size can sustain.<sup>65</sup>

§ 1058. **Chemists.**—Chemists likewise may give their opinions as to many matters; for example, as to whether a fertilizer was worthless,<sup>66</sup> whether certain liquor is fermented,<sup>67</sup> and as to the quality<sup>68</sup> and constituent parts of a compound.<sup>69</sup> They may testify as to the effects of a poison,<sup>70</sup> as to the use of chemicals in the alteration of a check,<sup>71</sup>

<sup>53</sup> *Line v. Mason*, 67 Mo. App. 279.

<sup>54</sup> *Hough v. Cook*, 69 Ill. 581.

<sup>55</sup> *Kuhn v. Railway Co.* 36 N. Y. S. 339.

<sup>56</sup> *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227.

<sup>57</sup> *Simmons v. Carrier*, 68 Mo. 416; *Shepard v. Ashley*, 10 Allen (Mass.) 542.

<sup>58</sup> *Stiles v. Neillsville Milling Co.* 87 Wis. 266, 58 N. W. 411.

<sup>59</sup> *Bedell v. Long Island R. Co.* 44 N. Y. 367.

<sup>60</sup> *Major v. Spies*, 66 Barb. 576. See, also, *Worden v. Connelly*, 196 Pa. St. 281, 46 Atl. 298.

<sup>61</sup> *McGonigle v. Kane*, 20 Colo. 292.

<sup>62</sup> *Hall v. Murdock*, 114 Mich. 233.

<sup>63</sup> *Fitts v. C. C. R. Co.* 59 Wis. 323.

<sup>64</sup> *Hartford Protection Co. v. Harmer*, 2 Ohio St. 452; *Leitch v. Atlantic Mutual Ins. Co.* 66 N. Y. 100.

<sup>65</sup> *Caven v. Bodwell Granite Co.* 97 Me. 381, 54 Atl. 851.

<sup>66</sup> *Wilcox v. Hall*, 53 Ga. 635.

<sup>67</sup> *Merkle v. State*, 37 Ala. 139.

<sup>68</sup> *Bierce v. Stocking*, 11 Gray, 176.

<sup>69</sup> *Allen v. Hunter*, 6 McLean, 303.

<sup>70</sup> *Com. v. Sturtivant*, 117 Mass. 122.

<sup>71</sup> *Birmingham National Bank v. Bradley* 116 Ala. 142, 23 So. 53.

and as to the direction from which blood spurted.<sup>72</sup> They may also give their opinion as to the effect of gases,<sup>73</sup> as to the effect of spirits evaporating,<sup>74</sup> and as to the effects of strychnine,<sup>75</sup> arsenic<sup>76</sup> and Paris green.<sup>77</sup> So, it has been held that a chemist may state whether a manufactured article called patent fuel is included in the term "coal."<sup>78</sup> But a consulting chemist and mining engineer, although having some experience in taking care of mines and removing gases therefrom, who had never seen any practical attempt to extract gases from a sewer and had no knowledge of experiments of that kind, was held, in a recent case, incompetent to testify as an expert as to the manner of removing gases from a sewer.<sup>79</sup>

§ 1059. **Engineers—Civil.**—Civil engineers have been allowed to state their opinions as to many things within the scope of their special knowledge and skill. The following are a few matters concerning which their opinion has been held admissible: As to liability of land to inundation,<sup>80</sup> the effect of a mill dam,<sup>81</sup> as to the meaning of technical terms,<sup>82</sup> as to whether it was customary to have gates on draw-bridges,<sup>83</sup> the causes for scouring<sup>84</sup> of land by water, concerning the probable cost of a bridge,<sup>85</sup> and as to the length of time of decay

<sup>72</sup> *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. R. 401.

<sup>73</sup> *Lincoln v. Taunton Copper Mfg. Co.* 9 Allen (Mass.) 181. And as to the cause of an explosion of nitro-glycerine. *Bradford Glycerine Co. v. Kizer*, 113 Fed. 894.

<sup>74</sup> *Turner v. The Ship Black Warrior*, 1 McAll. (U. S.) 181.

<sup>75</sup> *State v. Cook*, 17 Kans. 392.

<sup>76</sup> *Hartung v. People*, 4 Park. Cr. R. (N. Y.) 319.

<sup>77</sup> *Fox v. Peninsular, &c. Works*, 92 Mich. 243.

<sup>78</sup> *Howard v. Great Western Insurance Co.* 109 Mass. 384. But see *People v. Lehr*, 196 Ill. 361, 63 N. E. 725. That oleomargarine looked like, and was a substitute for, or imitation of butter. *State v. Ehinger*, 67 Ohio St. 51, 65 N. E. 148.

<sup>79</sup> *Fuchs v. City of St. Louis*, 167

Mo. 620, 67 S. W. 610, 57 L. R. A. 136. But compare *Logansport, &c. Gas Co. v. Coate*, 29 Ind. App. 299, 64 N. E. 638.

<sup>80</sup> *Clason v. City of Milwaukee*, 30 Wis. 316.

<sup>81</sup> *Ball v. Hardesty*, 38 Kans. 540.

<sup>82</sup> *Reed v. Hobbs*, 3 Ill. 297; *Skelton v. Fenton Electric Co.* 100 Mich. 87, 58 N. W. 609.

<sup>83</sup> *Hart v. Hudson River Bridge Co.* 84 N. Y. 56 (but not as to whether it was safe to have draws with drop gates when the draw was open, where this was the very question for the jury and one upon which they could form an intelligent judgment from the facts).

<sup>84</sup> *Mayer v. N. Y. Central R. Co.* 98 N. Y. 645.

<sup>85</sup> *Bryan v. Town of Branford*, 50 Conn. 246.

in timber.<sup>86</sup> Their opinions have also been held admissible as to the following: The effect of an embankment upon a harbor;<sup>87</sup> whether a dam would cause the overflow of adjoining land by back water;<sup>88</sup> as to whether there was an obstruction making the head-light of a train invisible, and as to how far it could have been seen if lighted;<sup>89</sup> as to rules for the construction of cuts and embankments;<sup>90</sup> whether the sinking of the foundation of an aqueduct caused the diversion of a water-course;<sup>91</sup> as to the necessary capacity of a sewer in a certain place for ordinary occasions;<sup>92</sup> that certain culverts would greatly assist in draining a tract,<sup>93</sup> and whether a railroad was properly constructed at a certain place.<sup>94</sup> Other cases where their opinions have been received are: As to the cost of completing a ditch;<sup>95</sup> as to the navigability of a stream at a place where a steamer collided with a bridge;<sup>96</sup> that the overflow of a stream resulted from natural causes;<sup>97</sup> as to how much more territory would be inundated at a given height of water;<sup>98</sup> as to the strength of materials and to show that a structure was not properly constructed as to sustain the weight to which it was subjected;<sup>99</sup> as to dry rot in a structure,<sup>100</sup> and as to the rules for the construction of cuts and embankments as such rules are found in standard works on engineering.<sup>101</sup>

§ 1060. **Engineers—Other than civil.**—Mining engineers may give their opinions as to the continuity of a vein;<sup>102</sup> railroad engineers

<sup>86</sup> *City of Indianapolis v. Scott*, 72 Ind. 196.

<sup>87</sup> *Folks v. Chadd*, 3 Doug. 157.

<sup>88</sup> *Grigsby v. Clear Water Co.* 40 Cal. 396.

<sup>89</sup> *Chicago, &c. R. Co. v. Chambers*, 68 Fed. 148. But such evidence has not always been received.

<sup>90</sup> *Central R. Co. v. Mitchell*, 63 Ga. 173.

<sup>91</sup> *Covert v. City of Brooklyn*, 39 N. Y. S. 434.

<sup>92</sup> *Hession v. City of Wilmington*, 1 Del. 122, 40 Atl. 749.

<sup>93</sup> *Willits v. Railway Co.* 88 Iowa, 281, 55 N. W. 313.

<sup>94</sup> *St. Louis, &c. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104. See, also, *Scott v. Astoria R. Co.* 43 Ore. 26, 72 Pac. 594.

<sup>95</sup> *McDonald v. Dodge Co.* 41 Neb. 905, 60 N. W. 366.

<sup>96</sup> *Chico Bridge Co. v. Sacramento Trans. Co.* 123 Cal. 178, 55 Pac. 780.

<sup>97</sup> *Ohio, &c. R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527.

<sup>98</sup> *Phillips v. Terry*, 3 Abb. App. Dec. (N. Y.) 607.

<sup>99</sup> *Callan v. Bull*, 113 Calif. 593, 45 Pac. 1021. Citing *Prendible v. Manufacturing Co.* 160 Mass. 131, 35 N. E. 675.

<sup>100</sup> *Blank v. Livonia Tp.* 79 Mich. 1, 44 N. W. 157.

<sup>101</sup> *Central R. Co. v. Mitchell*, 63 Ga. 173.

<sup>102</sup> *Kahn v. Mining Co.* 2 Utah, 174. But a mining engineer who had no practical experience in ventilating sewers or removing gas



as to when a railroad was completed;<sup>103</sup> as to stopping electric cars with sand;<sup>104</sup> as to whether a culvert was properly put in;<sup>105</sup> hydraulic engineers as to the proper construction of a pipe for carrying sewerage;<sup>106</sup> electrical engineers as to whether certain contrivances for suspending electric lamps were defective;<sup>107</sup> mechanical engineers as to the test of a boiler pipe;<sup>108</sup> as to the strength and safe speed for running grindstones;<sup>109</sup> as to the character of a strain upon steam fitting;<sup>110</sup> as to the safety of a certain grease tank,<sup>111</sup> and as to the length of time for the corroding of a boiler;<sup>112</sup> stationary engineers as to the effect of suddenly opening a valve of a boiler;<sup>113</sup> as to the effect of a leaky throttle valve on the safety of a locomotive;<sup>114</sup> as to appliances necessary to keep sparks from escaping from a threshing machine,<sup>115</sup> and a steamboat engineer as to the value and condition of a steamboat after a collision.<sup>116</sup> There are many matters connected with railroading on which locomotive engineers are also permitted to give their opinions, but these will be hereafter considered. It has been held, however, that a railroad civil engineer, in an action against a railroad company for killing stock which were alleged to have entered upon the track because of an insufficient cattle guard, should not be permitted to testify that the cattle guard was the best

therefrom, and who had never seen any experiments or heard of his method being tried, has been held incompetent to give an opinion as to the method that ought to be pursued. *Fuchs v. City of St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

<sup>103</sup> *Hilton v. Mason*, 92 Ind. 157, (court says witness was a railroad engineer, but does not say whether locomotive or civil).

<sup>104</sup> *Maxwell v. Railroad Co. (Del.)*, 40 Atl. 945 (locomotive engineer).

<sup>105</sup> *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305 (civil engineer). See, also, *Chicago, &c. R. Co. v. Price*, 97 Fed. 423 (opinion admissible as to whether condition of track was likely to cause coupling pin to be thrown out).

<sup>106</sup> *Stead v. Worcester*, 150 Mass. 241, 22 N. E. 893.

<sup>107</sup> *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553.

<sup>108</sup> *Innes v. City of Milwaukee*, 103 Wis. 582, 79 N. W. 783.

<sup>109</sup> *Helfenstein v. Medart*, 136 Mo. 595.

<sup>110</sup> *Pollock v. Pennsylvania Iron Works Co.* 13 Misc. (N. Y.) 194.

<sup>111</sup> *Fischer v. Heitzeberg Packing P. Co.* 77 Mo. App. 108.

<sup>112</sup> *Egan v. Dry Dock, &c. R. Co.* 12 N. Y. App. Div. 556.

<sup>113</sup> *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 72 N. W. 1124.

<sup>114</sup> *Brabbitts v. Chicago, &c. R. Co.* 38 Wis. 289.

<sup>115</sup> *Richardson v. Douglass*, 100 Iowa, 239, 69 N. W. 530.

<sup>116</sup> *The Clipper v. Logan*, 18 Ohio, 395.

in use to turn stock generally and at the same time not injure or endanger employes and the traveling public.<sup>117</sup>

§ 1061. **Farmers.**—A farmer is competent to testify as an expert in many matters. Thus, it has been held that he may give his opinion as to whether land should be drained in order to make it in good condition for farming purposes;<sup>118</sup> whether or not milk has been mixed with water;<sup>119</sup> what expense would be attached to the clearing of a tract of land,<sup>120</sup> also, as to the yield per acre;<sup>121</sup> as to the use of a fertilizer,<sup>122</sup> and as to checking a fire by plowing.<sup>123</sup> Farmers have been allowed, also, to state their opinions as to the value,<sup>124</sup> age<sup>125</sup> and weight<sup>126</sup> of domestic animals and as to the proper management of stock.<sup>127</sup> Also, as to the probable damage to crops,<sup>128</sup> and as to the proper time for firing grazing tracts.<sup>129</sup> So, also, they have been allowed to express their opinions in testimony as to the weight of hogs;<sup>130</sup> as to the value of a mare;<sup>131</sup> value of the use of a team of horses;<sup>132</sup> effect of disturbance upon the value of cattle;<sup>133</sup> as to whether a cow is diseased;<sup>134</sup> as to probable increase in a flock of

<sup>117</sup> *New York, &c. R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1085; *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. 1065; *Kansas City, &c. R. Co. v. Spencer*, 72 Miss. 491, 17 So. 168. See, also, *Veerhusen v. Chicago, &c. R. Co.* 53 Wis. 689, 11 N. W. 433.

<sup>118</sup> *Buffum v. Harris*, 5 R. I. 243.

<sup>119</sup> *Lane v. Wilcox*, 55 Barb. (N. Y.) 615.

<sup>120</sup> *Barnum v. Bridges*, 81 Cal. 604.

<sup>121</sup> *Isaacs v. McLean*, 106 Mich. 79, 64 N. W. 2; *Townsend v. Bonwill*, 5 Harr. (Del.) 474.

<sup>122</sup> *Young v. O'Neal*, 57 Ala. 566.

<sup>123</sup> *Krippner v. Bieble*, 28 Minn. 139.

<sup>124</sup> *Smith v. Indianapolis, &c. R. Co.* 80 Ind. 233; *Bischoff v. Schultz*, 5 N. Y. S. 757; *Mason v. Patrick*, 100 Mich. 577, 59 N. W. 239; *Choc-*

*taw, &c. R. Co. v. Deperade* (Okl.), 71 Pac. 629.

<sup>125</sup> *Moreland v. Mitchell Co.* 40 Iowa, 394.

<sup>126</sup> *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270.

<sup>127</sup> *North Missouri, &c. v. Akers*, 4 Kans. 388, 96 Am. Dec. 183.

<sup>128</sup> *State v. Wilcox*, 57 Barb. (N. Y.) 604; *Tucker v. Mass. &c.* 118 Mass. 546.

<sup>129</sup> *Ferguson v. Hubbell*, 26 Hun (N. Y.) 250. See, also, *Farmers', &c. Bank v. Woodell*, 38 Ore. 294, 61 Pac. 837.

<sup>130</sup> *McCormack v. Hamilton*, 23 Gratt. 561.

<sup>131</sup> *Brown v. Moore*, 32 Mich. 254.

<sup>132</sup> *Kennett v. Fickel*, 41 Kans. 211.

<sup>133</sup> *Baltimore, &c. R. Co. v. Thompson*, 10 Md. 80.

<sup>134</sup> *State v. Wilcox*, 57 Barb. (N. Y.) 604.

sheep;<sup>135</sup> as to the value of land crops,<sup>136</sup> stock<sup>137</sup> or services;<sup>138</sup> as to how much corn was or might be produced on a certain field;<sup>139</sup> as to value of pasturing transiently;<sup>140</sup> as to the value of damaged grass,<sup>141</sup> and as to the injury sustained by the overflowing of a certain woodland.<sup>142</sup> As to matters which are peculiarly within the knowledge of persons of their occupation farmers are, in a sense, experts,<sup>143</sup> and their opinions are admissible as the opinions of experts in proper cases. But it is not to be understood, because their opinions may be admissible on a particular phase or branch of a subject as to which they may be said to be experts, that their opinions are admissible as expert opinions even on the same general subject when it is a different branch and extends beyond the field in which they have peculiar knowledge or skill.<sup>144</sup>

§ 1062. **Gardeners.**—Gardeners may give opinions as to the use of fertilizers;<sup>145</sup> as to the necessity of drainage for cultivation;<sup>146</sup> as to what could be most suitably cultivated on a certain tract;<sup>147</sup> as to injury to vegetation from brick kilns,<sup>148</sup> and as to the effect of opening celery trenches.<sup>149</sup> Much that has been said in regard to farmers

<sup>135</sup> *In re More's Estate*, 121 Cal. 616, 54 Pac. 97.

<sup>136</sup> *McLellan v. Leman*, 57 Minn. 317, 59 N. W. 628.

<sup>137</sup> *Plunkett v. Railroad Co.* 79 Wis. 222, 48 N. W. 519.

<sup>138</sup> *Arkansas R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550.

<sup>139</sup> *Townsend v. Bonwill*, 5 Harr. (Del.) 474. See, also, *Farmers', &c. Bank v. Woodell*, 38 Ore. 294, 61 Pac. 837.

<sup>140</sup> *Cornell v. Dean*, 105 Mass. 435.

<sup>141</sup> *Townsend v. Brundage*, 4 Hun, 264.

<sup>142</sup> *Paine v. Woods*, 108 Mass. 166.

<sup>143</sup> See *Hale v. Handy*, 26 N. H. 217; *Wolschied v. Thorne*, 76 Mich. 20, 43 N. W. 12; *Lawson Exp. & Opin. Ev.* 15.

<sup>144</sup> See *Aultman Co. v. Mosloski*, 77 Minn. 27, 79 N. W. 593; *Lamoure v. Caryl*, 4 Denio (N. Y.) 370; *Brown v. Providence, &c. R. Co.* 12 R. I. 238; *Terpenning v. Corn Exchange Ins. Co.* 43 N. Y.

279. So they are not admissible when the matter is one of common knowledge and the jury can judge of it and draw proper inferences from the facts. *Somers v. Dukes*, 8 Minn. 23; *Enright v. San Francisco, &c. R. Co.* 33 Cal. 230 (both holding such evidence as to the sufficiency of a fence to turn cattle inadmissible); *Higgins v. Dewey*, 107 Mass. 494; *Concord R. Co. v. Greely*, 23 N. H. 237; *Frazer v. Tupper*, 29 Vt. 409; *Bills v. City of Ottumwa*, 35 Iowa, 109; *Smead v. Lake Shore, &c. R. Co.* 58 Mich. 200, 24 N. W. 761. But compare *Louisville, &c. R. Co. v. Spain*, 61 Ind. 460.

<sup>145</sup> *Young v. O'Neal*, 57 Ala. 566.

<sup>146</sup> *Buffum v. Harris*, 5 R. I. 243.

<sup>147</sup> *Chandler v. Jamaica Pond Aqueduct Corporation*, 125 Mass.

<sup>148</sup> *Vandine v. Burpee*, 13 Met. (Mass.) 288, 46 Am. Dec. 733.

<sup>149</sup> *Van Worden v. Winslow*, 117 Mich. 564, 76 N. W. 87.

applies to gardeners. The latter, indeed, may be regarded as a particular class or species of farmers or agriculturists, the field of their special skill and knowledge being thus somewhat limited, and yet as to some special matters they may be persons of skill and experience when the ordinary general farmer is not.

§ 1063. **Horsemen and breeders.**—Opinions of horsemen and breeders are received in evidence as to matters peculiarly within their knowledge, experience or skill in the line of their occupation. Thus, they may give their opinion in evidence in a proper case as to whether a horse, which they had examined, died of fright or some ailment;<sup>150</sup> the effect of foundering a horse upon the value of it;<sup>151</sup> as to what was the ailment of a sick horse,<sup>152</sup> and as to what effect a disease had upon the value of a certain stallion.<sup>153</sup> The first case above referred to is interesting and peculiar. A horse, drawing a carriage along a public road, suddenly reared, plunged a few steps and instantly fell down dead, the carriage being upset in the fall and the occupant injured, and for this the action was brought. The plaintiff claimed that the horse frightened at an object alleged to have been negligently left at the side of the road and that this caused him to rear and fall and die; and the defendant sought to introduce the evidence of a horseman and of a blacksmith who had handled horses all his life, to the effect that neither the fall nor the sudden fright could have killed the horse. The court held that the evidence should have been admitted, saying, among other things, that it is notorious that horses, like human beings, die suddenly and of similar diseases; that the witnesses were qualified; that the actual physical fact or condition which produced the death of the horse could not be known, and that it was proper, if not absolutely necessary, to call to the aid of the jury the opinions of persons having experience in such matters.

§ 1064. **Lawyers.**—Lawyers may give expert testimony in a foreign jurisdiction as to the unwritten laws and practice of their own jurisdiction.<sup>154</sup> Thus, a lawyer of one state may testify in

<sup>150</sup> Piolet v. Sommers, 106 Pa. St. 95, 51 Am. R. 496.

<sup>151</sup> Bischoff v. Schultz, 5 N. Y. S. 757.

<sup>152</sup> Woolwine v. Bick, 39 Mo. App. 495.

<sup>153</sup> Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. 143.

<sup>154</sup> Genet v. Canal Co. 35 N. Y. S. 147; Walker v. Forbes, 31 Ala. 9; Mowry v. Chase, 100 Mass. 80; Hume v. Brelsford, 51 Mo. App. 664; Berhaus v. Telegraph Co. 8 Ind. App. 246, 34 N. E. 587; Palmer v. Hudson River State Hospital, 10 Kans. App. 98, 61 Pac. 506; Bar-

another state that an action of ejectment could be maintained in his state;<sup>155</sup> that a note is negotiable in his state;<sup>156</sup> as to the validity of a service of process;<sup>157</sup> as to the sufficiency of a deed.<sup>158</sup> The interpretation of foreign statutory or written law sanctioned by practice or decisions is also provable in the same way.<sup>159</sup> And it has likewise been held that the statutory law may be proved by experts without producing an exemplified copy.<sup>160</sup> But lawyers cannot, ordinarily at least, express opinions as to the law of the forum;<sup>161</sup> and even in the case of a foreign law it is regarded as a matter of fact rather than a mere matter of opinion, although the English cases are very strict in their requirements as to the competency of the witness.<sup>162</sup> Lawyers may testify as to the value of legal services.<sup>163</sup> But it has been held that where the question is as to the usual and reasonable charges or fees for certain services in a particular part of the state, in order to

ber v. Hildebrand, 42 Neb. 400, 60 N. W. 594; Union Cent. Life Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355; note in 11 Am. Dec. 785.

<sup>158</sup> Layton v. Chalon, 4 La. Ann. 318.

<sup>159</sup> Tyler v. Trabue, 8 B. Mon. (Ky.) 306.

<sup>160</sup> Mowry v. Chase, 100 Mass. 79.

<sup>161</sup> Wilson v. Carson, 12 Md. 54.

<sup>162</sup> Bush v. Garner, 73 Ala. 162, 168; Dyer v. Smith, 12 Conn. 384.

<sup>163</sup> Sussex Peerage Case, 11 Clark & F. 85; Consolidated Real Est. &c. Co. v. Cashow, 41 Md. 60, 79; Pickard v. Bailey, 26 N. H. 152; Barrows v. Downs 9 R. I. 446, 11 Am. R. 283. But see Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336. It would seem that the best evidence rule might exclude such testimony, but the matter is largely regulated by statute. See note in 11 Am. Dec. 784. As to the effect of the best evidence rule see Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Comparet v. Jernegen, 5 Blackf. (Ind.) 375; Mc-

Neill v. Arnold, 17 Ark. 168; Hoes v. Van Alstyne, 20 Ill. 203; Raynham v. Canton, 3 Pick. (Mass.) 293.

<sup>161</sup> Moore v. Gaus Mfg. Co. 113 Mo. 98, 30 S. W. 975; Messune v. Noble, 11 Ill. 531; Pittsburgh, &c. R. Co. v. Reich, 101 Ill. 157; Lee v. Breezly, 54 Iowa, 660; Gaylor's Appeal, 43 Conn. 82.

<sup>162</sup> See Cartwright v. Cartwright, 26 W. R. 684; Bonelli's Goods, L. R. 1, P. D. 69, 45 L. J. J. P. 42, 24 W. R. 255. But see as to familiarity of an American lawyer with English law held sufficient to qualify. Barber v. International Co. 73 Conn. 587, 48 Atl. 758.

<sup>163</sup> Allis v. Day, 14 Minn. 516; Stevens v. Ellsworth, 95 Iowa, 231, 63 N. W. 683; Covey v. Campbell, 52 Ind. 157; Isham v. Parker, 3 Wash. 755; Halaska v. Cotzhauser, 52 Wis. 624. But see Walker v. Cook, 33 Ill. App. 561. In Norris v. Crandall, 133 Cal. xix, 65 Pac. 568, a lawyer was permitted to testify as to the value of real estate.

qualify as experts, it should be shown that they knew the rates charged in the county or vicinity in which the services were rendered.<sup>164</sup>

§ 1065. **Lumbermen.**—Lumbermen may give opinions, in proper cases, as to the number of men necessary to keep logs moving in a stream;<sup>165</sup> whether one could have continued to put in a certain amount of logs a day;<sup>166</sup> as to the quality of lumber;<sup>167</sup> as to the extent of the rise in the price of lumber;<sup>168</sup> as to the proper method of floating logs;<sup>169</sup> as to whether a raft was safely moored,<sup>170</sup> and that one could have finished the work during the logging season.<sup>171</sup> In some of these cases, however, particular stress is laid upon the fact that the circumstances were first detailed as fully as possible to the jury, and that they could not be so fully stated as to enable the jury to decide the question without the aid of opinion evidence. In the last case cited the court said that the evidence was “in the nature of expert evidence,” and admissible as such. In another case, however, where the question involved was whether certain lumber had been negligently piled, it was held that a witness, although experienced in such work, could not give his opinion as to how it might or should have been piled.<sup>172</sup>

§ 1066. **Machinists.**—Qualified machinists may give testimony as to matters of technical skill concerning their vocation. The following are illustrative cases of matters upon which there testimony has been received: Whether a revolving shaft is dangerous;<sup>173</sup> whether a method of work is dangerous;<sup>174</sup> whether an engine was properly placed;<sup>175</sup> the cause of defects in a saw-mill;<sup>176</sup> why an emery-stone

<sup>164</sup> *Stevens v. Ellsworth*, 95 Iowa, 231, 63 N. W. 683. But see *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

<sup>165</sup> *Butterfield v. Gilchrist*, 63 Mich. 155, 29 N. W. 682. The syllabus in this case as reported in the Northwestern Reporter, seems to be erroneous.

<sup>166</sup> *Salvo v. Duncan*, 49 Wis. 157.

<sup>167</sup> *Moore v. Lea*, 32 Ala. 375.

<sup>168</sup> *Hill v. Canfield*, 63 Pa. St. 76.

<sup>169</sup> *Dean v. McLean*, 48 Vt. 412, 21 Am. R. 130.

<sup>170</sup> *Hayward v. Knapp*, 23 Minn. 430.

<sup>171</sup> *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979.

<sup>172</sup> *Baldwin v. St. Louis, &c. R. Co.* 68 Iowa, 37, 25 N. W. 918. The court considered that the piling of lumber was not a matter involving any technical knowledge or skill.

<sup>173</sup> *Pullman Palace Car Co. v. Harkins*, 55 Fed. 932.

<sup>174</sup> *O'Brien v. Look*, 171 Mass. 36, 50 N. E. 458.

<sup>175</sup> *Kumberger v. Congress Spring Co.* 158 N. Y. 339, 53 N. E. 3.

<sup>176</sup> *Chandler v. Thompson*, 30 Fed. 38.

burst;<sup>177</sup> as to the construction of an emery-wheel;<sup>178</sup> as to the construction of tongs.<sup>179</sup> They may testify as to the capacity and repair of a hoisting-machine;<sup>180</sup> whether a certain machine performed its mission;<sup>181</sup> as to the merits of a cotton gin;<sup>182</sup> as to the merits of a spring safety for elevators;<sup>183</sup> as to the proper material for a bolt;<sup>184</sup> as to the respective merits of the latch and spring needles,<sup>185</sup> and as to ascertaining a defect in iron<sup>186</sup> or a crack in a casting.<sup>187</sup> They may also give their opinion, in a proper case, as to whether machinery has been properly operated.<sup>188</sup> It is not to be understood, however, that they may invade the province of the jury, and they must be qualified in regard to the subject on which they speak.<sup>189</sup>

§ 1067. **Masons.**—Masons may give their opinions on matters concerning their trade, such as are not matters of common knowledge requiring no special skill or knowledge. Thus, they may testify as to whether an arch would have collapsed if the mortar had been dry and properly supported;<sup>190</sup> as to the length of time for drying walls so as to make the house habitable;<sup>191</sup> as to the proper manner of measuring masonry;<sup>192</sup> as to what quantity of sand was mixed with a

<sup>177</sup> *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417.

<sup>178</sup> *Mintaugh v. Railway Co.* 3 N. Y. S. 483.

<sup>179</sup> *Neubauer v. Northern Pacific*, 60 Minn. 130, 61 N. W. 912.

<sup>180</sup> *Bemis v. Railroad Co.* 58 Vt. 636.

<sup>181</sup> *Greenleaf v. Stockton Works*, 78 Calif. 616, 21 Pac. Rep. 369.

<sup>182</sup> *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. R. 515.

<sup>183</sup> *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

<sup>184</sup> *Chalmers v. Whitmore Mfg. Co.* 164 Mass. 532, 42 N. E. 98.

<sup>185</sup> *James v. Hodsden*, 47 Vt. 127.

<sup>186</sup> *St. Louis R. Co. v. Farr*, 56 Fed. 994.

<sup>187</sup> *Pacheco v. Judson Mfg. Co.* 113 Cal. 541, 45 Pac. 833.

<sup>188</sup> *Galveston, &c. Co. v. Burkett*, 2 Tex. Civ. App. 308; *Ouillet v. Overman Wheel Co.* 162 Mass. 305, 38 N. E. 511; *Weber Wagon Co. v.*

*Kehl*, 139 Ill. 644, 29 N. E. 714.

For other illustrative cases, see generally, *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Craig v. Benedictine, &c. Assn.* 88 Minn. 535, 93 N. W. 669; *Baltimore, &c. Tpk. Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257; *St. Louis, &c. R. Co. v. Farr*, 56 Fed. 994; *Woods v. Chicago, &c. R. Co.* 108 Mich. 396, 66 N. W. 328; *Murphy v. Marston Coal Co.* 183 Mass. 385, 67 N. E. 342.

<sup>189</sup> See *Caven v. Bodwell Granite Co.* 97 Me. 381, 54 Atl. 857; *Kitteringham v. Sioux City, &c. R. Co.* 62 Iowa, 285, 17 N. W. 585; *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368; *Matthews v. Daly West Min. Co.* 21 Utah, 207, 75 Pac. 722.

<sup>190</sup> *Tremblay v. Mapes-Reeve Construction Co.* 169 Mass. 284.

<sup>191</sup> *Smith v. Gugerty*, 4 Barb. 614.

<sup>192</sup> *Shulte v. Hennessy*, 40 Iowa, 352.

cask of lime in making certain mortar,<sup>193</sup> and as to whether or not certain walls could resist certain pressure.<sup>194</sup> It has been held that a mason having no general knowledge as to the construction of buildings could not give testimony as to the cause of a collapse of the floors and walls of the structure.<sup>195</sup> But a mason having such knowledge may give his opinion as to whether the fall of rain within the wall was of such an amount as to wash down the wall.<sup>196</sup>

**§ 1068. Merchants and manufacturers.**—Merchants and manufacturers may often give their opinion as to matters in their particular line.<sup>197</sup> Thus, their opinions are generally admissible as to the value of articles, such as those with which they deal or which they manufacture.<sup>198</sup> So, the testimony of a manufacturer and dealer in wool has been held admissible as to whether wool waste is liable to ignite spontaneously when stored in a wet state.<sup>199</sup> A witness who had been employed for many years in manufacturing, handling and shipping condensed milk is competent to testify as an expert as to the effect of heat and cold upon such milk.<sup>200</sup> And the owner of a tanyard, who had been engaged in the business for twenty-five years and saw and knew how the work was done, although he employed others to do it, has also been held an expert as to that subject.<sup>201</sup>

**§ 1069. Millers and millwrights.**—Millers and millwrights may give their opinions in evidence as to the effect upon the water in an adjoining factory of opening and shutting a mill-gate;<sup>202</sup> as to the repairs necessary to put a mill in good condition;<sup>203</sup> as to the proper manner of floating logs through a dam;<sup>204</sup> as to the meaning of "race-way;"<sup>205</sup> as to the quantity of grain a mill has the capacity

<sup>193</sup> *Miller v. Shay*, 142 Mass. 598.

<sup>194</sup> *Sneda v. Libera*, 65 Minn. 337.

<sup>195</sup> *Peteler Portable Mfg. Co. v. Northwestern Mfg. Co.* 60 Minn. 127, 61 N. W. 1024.

<sup>196</sup> *Montgomery v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562.

<sup>197</sup> *Williams v. Brooks*, 50 Conn. 285; *Rich v. Lyler*, 13 Jones & Sp. (N. Y.) 601; *Sexton v. Lamb*, 27 Kans. 426; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; *Leopold v. Van Kirk*, 29 Wis. 548.

<sup>198</sup> *Lawson v. Chase*, 108 Mass. 238; *Hackett v. Railroad Co* 35 N. H. 398; *Smith v. Jensen*, 181

Cal. 120, 22 Pac. 434; *Alfonso v. United States*, 2 Story, 421; *Browning v. Long Island R. Co.* 2 Daly (N. Y.) 117.

<sup>199</sup> *Whitney v. Chicago, &c. R. Co.* 27 Wis. 344.

<sup>200</sup> *St. Louis, &c. R. Co. v. Elgin*, 175 Ill. 557, 51 N. E. 911. See, also, *Kershaw v. Wright*, 115 Mass. 361.

<sup>201</sup> *Nelson v. Wood*, 62 Ala. 175.

<sup>202</sup> *Hammond v. Woodman*, 41 Me. 207.

<sup>203</sup> *Taylor v. French Lumbering Co.* 47 Iowa, 662.

<sup>204</sup> *Dean v. McLean*, 48 Vt. 412.

<sup>205</sup> *Wilder v. De Cou*, 26 Minn. 10.



for grinding, and as to the value of a certain stream for milling purposes.<sup>206</sup> So it has been held that an owner of mills may give an opinion as to the capacity of a wheelwright;<sup>207</sup> as to whether a paper mill and machinery were in good order,<sup>208</sup> and whether a certain cloth was necessary in a mill.<sup>209</sup> Likewise, they may express their opinions as to the quality and component parts of flour;<sup>210</sup> as to the identity of grain from smelling the same;<sup>211</sup> as to the accuracy of the manner of weighing and measuring grain;<sup>212</sup> as to the effect upon grinding by placing a dam one foot lower<sup>213</sup> at another place in the stream;<sup>214</sup> as to the effect of a dam backing up water on another mill,<sup>215</sup> and whether or not there should be a guard around a gearing.<sup>216</sup> But merely being a millwright does not necessarily show that one is an expert on the cause of the breaking of pulleys, nor entitle him to give an opinion as an expert as to what caused a pulley in a mill to break.<sup>217</sup>

§ 1070. **Miners.**—Miners may also be called as experts to give opinions as to matters concerning their vocation.<sup>218</sup> Thus, a practical miner may state his opinion as to the safety of a particular blasting powder which he had made use of;<sup>219</sup> as to the cause of the cracking and settling of a mine;<sup>220</sup> as to the proper method of timbering a shaft,<sup>221</sup> and as to the usual method of so timbering.<sup>222</sup> It has also been held that miners may testify as to the competency of a cer-

<sup>206</sup> *Read v. Barker*, 30 N. J. L. 378; *Read v. Barker*, 33 N. J. L. 477.

<sup>207</sup> *Doster v. Brown*, 25 Ga. 24; *Hammond v. Woodman*, 41 Me. 179. See *Walker v. Fields*, 28 Ga. 237.

<sup>208</sup> *Blodgett Paper Co. v. Farmer*, 41 N. H. 398.

<sup>209</sup> *Cooke v. England*, 77 Md. 14.

<sup>210</sup> *Davis v. Mills*, 163 Mass. 481.

<sup>211</sup> *Walker v. State*, 58 Ala. 393.

<sup>212</sup> *Read v. Barker*, 30 N. J. L. 378, 32 N. J. L. 477.

<sup>213</sup> *Detweiler v. Groff*, 10 Pa. St. 376.

<sup>214</sup> *Woods v. Allen*, 18 N. H. 28.

<sup>215</sup> *Ball v. Hardesty*, 38 Kans. 540.

<sup>216</sup> *Peterson v. Johnson-Wentworth Co.* 70 Minn. 538.

<sup>217</sup> *Duntley v. Inman & Co.* 42 Ore. 334, 70 Pac. 529, 59 L. R. A. 785.

<sup>218</sup> In *Czarecki v. Seattle, &c. Co.* 30 Wash. 288, 70 Pac. 750, it is said that it is peculiarly within the discretion of the trial court to allow experienced miners to testify to conclusions in the nature of expert evidence, upon a showing of competency deemed satisfactory to the court.

<sup>219</sup> *Snowden v. Idaho Quartz Mfg. Co.* 55 Cal. 450.

<sup>220</sup> *Clark v. Willett*, 35 Cal. 534.

<sup>221</sup> *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771.

<sup>222</sup> *Monohan v. Kansas City Coal Co.* 58 Mo. App. 68.

tain superintendent;<sup>223</sup> as to the method of discovering a lode;<sup>224</sup> whether it is practicable for two persons to run mines adjoining;<sup>225</sup> as to the safety of a space between a car and the walls;<sup>226</sup> as to obviating danger from falling stones;<sup>227</sup> and whether a mine could be worked if drained.<sup>228</sup> So, in a recent case, which was an action for injuries to a miner by an explosion in a shaft, it was held that a question was properly submitted to an expert miner as to whether it would have been possible to have so arranged the guides to the shaft as to lower the cage to the bottom of the shaft on which the plaintiff was working, as this could not well be proved except by expert opinions.<sup>229</sup> But the opinions of miners as to the quantity of earth or gravel that a miner could remove in a day have been held to be properly excluded where they were not shown to be familiar with the ground in question, and the character or condition of the ground and the season of the year were not stated in the question put to them.<sup>230</sup>

§ 1071. **Nautical men.**—The opinions of nautical men are admissible in proper cases on questions of skill and special knowledge as to the management of boats and vessels. Thus, they have been held admissible as to how a vessel should be managed under a given state of facts;<sup>231</sup> as to the mode of making repairs;<sup>232</sup> as to what is a proper and competent crew for a trip;<sup>233</sup> as to whether a certain mode of loading a vessel increased the risk;<sup>234</sup> as to the mode of raising

<sup>223</sup> *Buckalew v. Tennessee R. Co.*  
112 Ala. 146, 20 So. 606.

<sup>224</sup> *Harrington v. Chambers*, 3  
Utah, 94, 1 Pac. 362.

<sup>225</sup> *Bennett v. Morris* (Cal.), 37  
Pac. 929.

<sup>226</sup> *McNamara v. Logan*, 100 Ala.  
187, 14 So. 175.

<sup>227</sup> *Acme Coal Co. v. Kusnir*, 71  
Ill. App. 446.

<sup>228</sup> *Bennett v. Morris* (Cal.), 37  
Pac. 929.

<sup>229</sup> *Hedlun v. Holy Terror Min.  
Co.* (S. Dak.), 92 N. W. 31. See,  
also, *Diamond Block Coal Co. v.  
Edmonson*, 14 Ind. App. 594, 43 N.  
E. 242.

<sup>230</sup> *Walton v. Wild Goose Min. &c.  
Co.* 123 Fed. 209.

<sup>231</sup> *Baltimore Elevator Co. v. Neal*,  
65 Md. 438; *Guiterman v. Liver-  
pool Steamship Co.* 83 N. Y. 358  
(but it was held that the question  
in this case was improper as being  
based on what the witness had  
heard of the evidence and leav-  
ing him to draw inferences and de-  
termine matters that were for the  
jury).

<sup>232</sup> *Sikes v. Paine*, 10 Ired. (N.  
Car.) 280, 51 Am. Dec. 389.

<sup>233</sup> *McLanahan v. Universal Insur-  
ance Co.* 1 Pet. (U. S.) 170.

<sup>234</sup> *Leitch v. Atlantic Insurance  
Co.* 66 N. Y. 100.

sunken vessels;<sup>235</sup> as to whether or not a vessel is seaworthy;<sup>236</sup> as to the probable causes of collisions and how the same may be avoided;<sup>237</sup> as to the meaning of technical terms;<sup>238</sup> as to the cause of a leak;<sup>239</sup> as to the possibility of discovering decayed timber in a vessel;<sup>240</sup> as to a proper crew;<sup>241</sup> as to matters concerning the use and management of tow-boats;<sup>242</sup> as to distance a light could be seen;<sup>243</sup> as to necessity of throwing off part of cargo for safety of vessel;<sup>244</sup> as to the safety of cotton on the deck;<sup>245</sup> as to proper method of stowing;<sup>246</sup> as to the capacity of a vessel;<sup>247</sup> as to the sufficiency of the fastenings at moorings and anchoring;<sup>248</sup> and as to the effect of waves.<sup>249</sup>

§ 1072. **Photographers.**—Photographers have been permitted to testify as to the genuineness of a signature to a note;<sup>250</sup> as to the number of photographs which could be produced by an artist in a month;<sup>251</sup> and as to whether certain photographs have been well executed.<sup>252</sup> A photographer was also allowed to give his opinion in a recent case as to whether an artist skillfully reproduced a photograph in a newspaper, in an action against the proprietor of the newspaper for alleged caricature of the plaintiff, who had permitted the photograph to be sent to the publisher with full knowledge that it was to be used for reproduction in the paper.<sup>253</sup> But the question as to

<sup>235</sup> *Steamboat Clipper v. Logan*, 18 Ohio, 375.

<sup>236</sup> *Baird v. Daly*, 68 N. Y. 547; *Western Insurance Co. v. Tobin*, 32 Ohio St. 77.

<sup>237</sup> *Steamboat Clipper v. Logan*, 18 Ohio 375; *Weaver v. Alabama Co.* 35 Ala. 176. As to whether vessel was negligently steered. *Melton v. Nesbitt*, 1 C. & P. 70.

<sup>238</sup> *Western Insurance Co. v. Tobin*, 32 Ohio St. 77.

<sup>239</sup> *Parsons v. Manufacturers' Insurance Co.* 16 Gray (Mass.) 463.

<sup>240</sup> *Cook v. Costner*, 9 Cush. (Mass.) 266.

<sup>241</sup> *McLanahan v. Universal Insurance Co.* 1 Pet. (U. S.) 184.

<sup>242</sup> *Union Insurance Co. v. Smith*, 124 U. S. 405; *Transportation Line v. Hope*, 95 U. S. 297; *Delaware, &c. Steam Towboat Co. v. Starrs*, 69 Pa. St. 36.

<sup>243</sup> *Case v. Perew*, 46 Hun (N. Y.) 57.

<sup>244</sup> *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. R. 645.

<sup>245</sup> *Lapham v. Atlas Insurance Co.* 24 Pick. (Mass.) 1.

<sup>246</sup> *Price v. Powell*, 3 N. Y. 322.

<sup>247</sup> *Ogden v. Parsons*, 23 How. (U. S.) 167.

<sup>248</sup> *Moore v. Westervelt*, 9 Bosw. (N. Y.) 558.

<sup>249</sup> *Western Insurance Co. v. Tobin*, 32 Ohio St. 77.

<sup>250</sup> *Marcy v. Barnes*, 16 Gray (Mass.) 161. The witness, however, had made a special study of handwriting.

<sup>251</sup> *Barnes v. Ingalls*, 39 Ala. 193.

<sup>252</sup> *Barnes v. Ingalls*, 39 Ala. 13.

<sup>253</sup> *Marston v. Dingley*, 88 Me. 546, 34 Atl. 414.

whether a certain photograph is obscene is not a question for the expert opinion of a photographer.<sup>254</sup>

§ 1073. **Railroad men.**—Another and somewhat comprehensive class of experts consists of railroad men. Some of them are experts as to certain matters in the strictest and fullest sense; others are experts in a more limited sense already explained. In either event, however, as to matters appertaining to railroading, in regard to which the witness has a special knowledge and skill, and which are not within the range of ordinary knowledge or experience, he is generally competent to give his opinion as an expert.<sup>255</sup> In many instances, too, such witnesses have special opportunities for knowing about matters in question, such as particular duties, practices and positions occupied by railroad men in doing their work, and, as to such matters, they are sometimes treated as experts; but while such witnesses may usually testify as to such relevant matters, when they have actual knowledge thereof, their testimony is often admissible in such cases as testimony of a fact, or, as it is sometimes called, a "collective fact," rather, perhaps, than as the opinion of an expert, although the decisions do not always make it clear as to which view is taken.<sup>256</sup> A full treatment of railroad men as experts, and the

<sup>254</sup> *People v. Muller*, 96 N. Y. 408, 48 Am. R. 635. "The issue," says the court, "was not whether in the opinion of witnesses, or of a class of people, the photographs were indecent or obscene, but whether they were so in fact, and upon this issue witnesses could neither be permitted to give their own opinions, or to state the aggregate opinion of a particular class or part of the community. To permit such evidence would put the witness in the place of the jury, and the latter would have no function to discharge. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen."

<sup>255</sup> See *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Chicago, &c. R. Co. v. Price*, 97 Fed. 423; *Howland v. Oakland, &c.*

*St. R. Co.* 110 Cal. 513, 42 Pac. 983; *Missouri, &c. R. Co. v. Merrill*, 61 Kans. 671, 60 Pac. 819 (citing and reviewing many cases); *Quinlan v. Chicago, &c. R. Co.* 113 Ia. 89, 84 N. W. 960; *Czezewzka v. Benton, &c. R. Co.* 121 Mo. 201, 25 S. W. 911; *Reifsnyder v. Chicago, &c. R. Co.* 90 Iowa, 76, 57 N. W. 692, 693; *Baldwin v. Chicago, &c. R. Co.* 50 Iowa, 680; *Cooper v. Central R. Co.* 44 Iowa, 134; *Bellefontaine, &c. R. Co. v. Bailey*, 11 Ohio St. 333; *Seaver v. Boston, &c. R. Co.* 14 Gray (Mass.) 466; *Texas Southern R. Co. v. Hart* (Tex. Civ. App.), 73 S. W. 833; *International, &c. R. Co. v. Collins* (Tex. Civ. App.), 75 S. W. 814.

<sup>256</sup> See *Alabama, &c. R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447; *Louisville, &c. R. Co. v. York*, 128 Ala. 305, 30 So. 676, 678; *Louisville,*

subjects upon which they may give their opinions, will be found in the chapter on the subject of expert opinion.

§ 1074. **Surveyors.**—Surveyors are men of science and skill in their line and may give expert testimony as to many matters in which they are specially skilled. It has been held, among the many other instances, that they may testify as to whether certain objects were placed as monuments of boundaries,<sup>257</sup> or a certain line was marked by surveyors of the government<sup>258</sup> as to the site of a survey,<sup>259</sup> and as to whether certain posts constitute the real boundary.<sup>260</sup> But it has been held that a surveyor may not give expert testimony as to the safety of a road,<sup>261</sup> nor as to the highest elevation of a tract.<sup>262</sup> It is not the business of surveyors to decide questions of law, nor ordinary matters of fact within the comprehension and province of the jury, and it has also been said, perhaps too strongly, that his testimony as a man of science is never receivable except in connection with the data from which he surveys.<sup>263</sup>

§ 1075. **Veterinary surgeons.**—Veterinary surgeons may give in evidence their opinion as experts as to the condition and diseases of animals;<sup>264</sup> as to the indications of whistling in a certain horse;<sup>265</sup> as to the possibility of a horse biting off his tongue;<sup>266</sup> as to the

&c. *R. Co. v. Watson*, 90 Ala. 68, 8 So. 249; *Quinlan v. Chicago*, &c. R. Co. 113 Iowa, 89, 84 N. W. 960; *Brady v. New York*, &c. R. Co. 184 Mass. 225, 68 N. E. 227; *Cleveland*, &c. R. Co. *v. Bergschicker* (Ind.), 69 N. E. 1000; *Palmquist v. Mine*, &c. Co. 25 Utah, 257, 70 Pac. 994; *Jackson v. Grand Ave. R. Co.* 118 Mo. 199, 24 S. W. 192, 198; *Czezewzka v. Benton*, &c. R. Co. 121 Mo. 201, 25 S. W. 911; *McGovern v. Smith*, 75 Vt. 104, 53 Atl. 326; *Reifsnyder v. Chicago*, &c. R. Co. 90 Iowa, 76, 57 N. W. 692, 693; *Railroad Co. v. Smith*, 22 Ohio St. 227, 246. But see *Springfield*, &c. R. Co. *v. Punttenney*, 200 Ill. 9, 65 N. E. 442; *Bliss v. United States Trac-tion Co.* 78 N. Y. S. 18.

<sup>257</sup> *Knox v. Clark*, 123 Mass. 216; *Jackson v. Lambert*, 121 Pa. St.

182; *Cligg v. Fields*, 7 Jones L. 52 (N. Car.) 37, 75 Am. Dec. 450.

<sup>258</sup> *Brantly v. Swift*, 24 Ala. 390.

<sup>259</sup> *Jones v. Lee*, 77 Mich. 35, 43 N. W. 855; *Jackson v. Lambert*, 121 Pa. St. 182; *Toomey v. Kay*, 62 Wis. 104, 22 N. W. 286; *Knox v. Clark*, 123 Mass. 216.

<sup>260</sup> *La Rue v. Smith*, 153 N. Y. 428.

<sup>261</sup> *Lincoln v. Inhabitants of Barre*, 5 Cush. (Mass.) 590.

<sup>262</sup> *Hovey v. Sawyer*, 5 Allen (Mass.) 554.

<sup>263</sup> *Jones v. Lee*, 77 Mich. 35, 43 N. W. 855, 857. But see *Toomey v. Kay*, 62 Wis. 104, 22 N. W. 286.

<sup>264</sup> *Missouri Pac. R. Co. v. Finley*, 38 Kans. 550.

<sup>265</sup> *Moore v. Haviland*, 61 Vt. 58, 17 Atl. 725.

<sup>266</sup> *People v. Theobald*, 92 Hun (N. Y.) 182.

period of time a horse has had a diseased eye.<sup>267</sup> They have been allowed to give their opinion that a horse had blind staggers,<sup>268</sup> and as to the nature and symptoms of Texas cattle fever.<sup>269</sup> But under the Wisconsin statute, which provides that no one shall practice veterinary medicine, nor testify as an expert concerning diseases of animals unless he is registered, and that no one shall be registered unless he is a graduate or the holder of a certificate or has practiced veterinary medicine in the state for five years, a witness, who claimed that he had been a veterinary surgeon for forty years, but was not shown to be registered or to have actually practiced veterinary medicine or surgery during any of that time, was held incompetent to give his opinion in regard to distemper in horses.<sup>270</sup>

§ 1076. **Well diggers or drivers.**—Well diggers carrying on their calling and being acquainted with a vicinity may give opinions whether a given thickness of intervening sub-soil, if undisturbed, is impervious to water;<sup>271</sup> as to the depth necessary to bore for pure water,<sup>272</sup> and as to the amount of sub-soil essential to afford a dam against a fountain.<sup>273</sup> In still another case, such a witness was permitted to give his opinion as to whether a well could have diverted water from a stream,<sup>274</sup> but there was no evidence as to the nature of the soil, nor as to whether the stream was supplied at all from underground sources, and the decision was reversed on appeal.<sup>275</sup>

§ 1077. **Miscellaneous.**—Of the numerous other examples of the opinions of experts, the following may be enumerated as a few of the many of a miscellaneous character.

Abstracters may give opinions as to some matters, but there are many matters concerning which they cannot give opinions; for example, as to whether title to property is defective since the sufficiency of any title to real property is a question of law, and not of fact to be proved by the opinions of witnesses.<sup>276</sup> So, it has been held, they

<sup>267</sup> House v. Fort, 4 Blackf. (Ind.) 293.

<sup>268</sup> People v. Bain, 88 Mich. 453, 50 N. W. 324.

<sup>269</sup> Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064.

<sup>270</sup> McCann v. Ullman, 109 Wis. 574, 85 N. W. 493.

<sup>271</sup> Buffum v. Harris, 5 R. I. 243.

<sup>272</sup> In re Thompson, 12 N. Y. S. 182.

<sup>273</sup> Buffum v. Harris, 5 R. I. 243.

<sup>274</sup> Van Wycklin v. City of Brooklyn, 41 Hun (N. Y.) 418.

<sup>275</sup> Van Wycklen v. City of Brooklyn, 118 N. Y. 424, 24 N. E. 179. There is, however, a strong dissenting opinion.

<sup>276</sup> Evans v. Gerry, 174 Ill. 595.

cannot give opinions as to whether a conveyance included a certain tract.<sup>277</sup> Ambrotypists and daguerreotypists may give opinions as to whether certain kinds of photographs were well executed.<sup>278</sup> Army officers may give expert testimony concerning some matters within their vocation, as they may testify as to customs in the army.<sup>279</sup> Artists in painting may give their opinion as to the genuineness of a painting,<sup>280</sup> and as to the market value of certain paintings.<sup>281</sup> Assayers may testify that blood on the shirt of a prisoner is not sheep's blood.<sup>282</sup>

Auctioneers have been permitted to testify as to the value of real estate.<sup>283</sup>

Blacksmiths have been allowed to give their opinions as to whether or not certain horse-shoes were summer or winter shoes;<sup>284</sup> as to the quality of iron in a pin,<sup>285</sup> and as to whether a hammer was skillfully repaired,<sup>286</sup> and boiler makers as to appliances to an engine to keep fire from escaping.<sup>287</sup>

Botanists may give their opinions in evidence as to whether the working of coke ovens near a park damaged the neighborhood trees.<sup>288</sup> Bookkeepers may state their opinion as to the meaning of an entry in a bank book difficult to decipher.<sup>289</sup>

Brakemen may give expert opinion as to their own proper positions when "riding" a car,<sup>290</sup> and as to whether a car coupling is defective and unsafe.<sup>291</sup>

Brass finishers may testify as to whether a casual inspection would disclose certain articles as worth more than old brass.<sup>292</sup>

Brick makers may give their opinions in evidence as to the proper

<sup>277</sup> *Norment v. Fostnaght*, 1 MacArthur (D. C.) 515.

<sup>278</sup> *Barnes v. Ingall*, 39 Ala. 193.

<sup>279</sup> *Bradley v. Arthur*, 4 B. & C. 292, 6 D. & R., 10 E. C. L. 585.

<sup>280</sup> *Folkes v. Chadd*, 3 Douglass, 157.

<sup>281</sup> *Houston, &c. R. Co. v. Burke*, 55 Tex. 323, 40 Am. R. 808.

<sup>282</sup> *State v. Knight*, 43 Me. 27.

<sup>283</sup> *Amory v. Melrose*, 162 Mass. 556, 39 N. E. 276.

<sup>284</sup> *Evarts v. Middlebury*, 53 Vt. 626.

<sup>285</sup> *Louisville, &c. R. Co. v. Berkeley*, 136 Ind. 181.

<sup>286</sup> *Johnson v. Missouri Pac. R. Co.* 96 Mo. 340, 35 N. E. 3.

<sup>287</sup> *Atchison, &c. R. Co. v. Osborn*, 58 Kans. 768, 51 Pac. 286.

<sup>288</sup> *Salwin v. Coal Co. L. R.*, 9 Ch. App. 708.

<sup>289</sup> *Kux v. Savings Bank*, 93 Mich. 511, 53 N. W. 828.

<sup>290</sup> *Reifsnyder v. Chicago, &c. R. Co.* 90 Iowa, 76.

<sup>291</sup> *Baltimore, &c. R. Co. v. Elliott*, 9 App. Cas. (D. C.) 341. See, also, *Goins v. Chicago, &c. R. Co.* 47 Mo. App. 173.

<sup>292</sup> *Jupitz v. People*, 34 Ill. 518, 520.

way of placing material in a kiln,<sup>293</sup> and as to whether a certain quantity of water was sufficient to wash down a certain brick wall.<sup>294</sup> Brokers may give their opinions in proper cases as to the meaning of certain technical terms peculiar to their calling;<sup>295</sup> as to the value of stocks,<sup>296</sup> and as to what a commission should be.<sup>297</sup> Cart drivers, it has been held, may testify as to whether one was driving at a safe rate of speed.<sup>298</sup> Clergymen may, in certain cases, give opinions as to marriage laws and customs of a foreign jurisdiction,<sup>299</sup> and definitions of technical terms in the calling;<sup>300</sup> clothing manufacturers as to the value of material for making clothes,<sup>301</sup> and one who has had experience in custom made clothing as to the injury caused by rain.<sup>302</sup> Coal operators may give an opinion as to the value of a lease of land for mining purposes.<sup>303</sup> Conductors may state as experts whether one brakeman could control the speed of a certain train;<sup>304</sup> but a railway conductor cannot give his opinion as to whether an accident would have happened if the car in question had been provided with guard chains.<sup>305</sup>

Conveyancers have been permitted to testify as to whether there had been an alteration of a word in a document;<sup>306</sup> dealers in clocks as to the value of clocks;<sup>307</sup> dynamite manufacturers as to probability of explosion in manufacture and handling of dynamite if properly carried on,<sup>308</sup> and engravers that pencil marks had been erased from

<sup>293</sup> *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

<sup>294</sup> *City Council v. Gilmer*, 33 Ala. 116.

<sup>295</sup> *Storey v. Salomon*, 6 Daly (N. Y.) 532.

<sup>296</sup> *Jonau v. Ferrard*, 3 Rob. (La.) 366.

<sup>297</sup> *Elting v. Sturtevant*, 41 Conn. 176.

<sup>298</sup> *Houston St. R. Co. v. Richart* (Tex. Civ. App.), 27 S. W. 918. But see *Houston St. R. Co. v. Richert*, 87 Tex. 539, 29 S. W. 1040.

<sup>299</sup> *Bird v. Commonwealth*, 21 Gratt. (Va.) 800; *People v. McQuaid*, 85 Mich. 123.

<sup>300</sup> *Bird v. St. Mark's Church*, 62 Iowa, 567.

<sup>301</sup> *Browning v. Long Island R. Co.* 2 Daly (N. Y.) 117.

<sup>302</sup> *Henry Sonneborn & Co. v.*

*Southern R. Co.* 65 S. Car. 502, 44 S. E. 77. So held, even though he had never seen the particular goods.

<sup>303</sup> *Chambers v. Brown*, 69 Iowa, 213.

<sup>304</sup> *Union Pac. R. Co. v. Novak*, 61 Fed. 573.

<sup>305</sup> *Bixby v. Montpelier, &c. R. Co.* 49 Vt. 123. See, also, *Gulf, &c. R. Co. v. Colbert* (Tex. Civ. App.), 31 S. W. 332.

<sup>306</sup> *Vinton v. Peck*, 14 Mich. 287.

<sup>307</sup> *Whiton v. Snyder*, 88 N. Y. 299. But a dealer in precious stones has been held incompetent to testify as to the commercial uses of ornaments claimed to be imitations of precious stones. *Lorsch v. United States*, 119 Fed. 476.

<sup>308</sup> *Judson v. Giant Powder Co.* 107 Cal. 549, 40 Pac. 1020.



a paper.<sup>309</sup> Ethnologists may give in evidence, in a proper case, their opinions as to the race of an individual;<sup>310</sup> examiners of writings may give their opinions as to whether erasures have been made in a document,<sup>311</sup> and excavators as to the proper manner of filling up excavations.<sup>312</sup> Fruit dealers may testify as to condition in which fruit was shipped.<sup>313</sup>

Gas fitters may give in evidence, in a proper case, their opinions as to whether gas-meters were usually classified as gas-fixtures,<sup>314</sup> and as to the length of time necessary for putting in certain gas-fixtures.<sup>315</sup> Geologists may testify as experts as to whether coals of a certain quality and quantity existed on the lands in question;<sup>316</sup> gunsmiths may testify as to the period of time since a gun was used,<sup>317</sup> and ice dealers as to the average loss of ice in handling and selling it.<sup>318</sup> Ichthyologists may give their opinion as to whether certain fish could go up a certain stream.<sup>319</sup>

It has also been held that inspectors of boilers may give their opinion as to whether a boiler had corroded at the time of a certain test,<sup>320</sup> and a jeweler as to what is included in a mortgage of a stock of goods of another jeweler,<sup>321</sup> and as to the market value of stolen jewelry where he is acquainted with the value of such jewelry, although he has no personal knowledge of the particular articles in question.<sup>322</sup> Liverymen may give their opinion as to whether over-driving was the cause of a horse disease.<sup>323</sup> Midwives may express their opinions as to whether the birth of a child is premature,<sup>324</sup> nurserymen may testify as to the value of trees which had been

<sup>309</sup> Reg. v. Williams, 8 C. & P. 434.

<sup>310</sup> White v. Clements, 39 Ga. 232, 242.

<sup>311</sup> Pate v. People, 8 Ill. 644.

<sup>312</sup> Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863. "That was a matter," says the court, "calling for special knowledge, and, in our opinion, expert testimony was properly admissible." It may admit of some question, however, as to whether it was a matter of special knowledge.

<sup>313</sup> Griffin v. Joannes, 80 Wis. 601, 50 N. W. 785.

<sup>314</sup> Downs v. Sprague, 1 Abbott's App. Dec. (N. Y.) 550.

<sup>315</sup> Swain v. Naglee, 17 Cal. 416.

<sup>316</sup> Stambaugh v. Smith, 23 Ohio St. 584, 595.

<sup>317</sup> Mangham v. State, 87 Ga. 549.

<sup>318</sup> Sexton v. Lamb, 27 Kans. 426.

<sup>319</sup> Cottrill v. Myrick, 12 Me. 230.

<sup>320</sup> Egan v. Dry Dock, &c. Co. 42 N. Y. S. 188.

<sup>321</sup> Brody v. Chittenden, 106 Iowa, 524, 76 N. W. 1009. Certain words were used in a technical sense in the trade, and the court held the evidence admissible on this ground.

<sup>322</sup> Baden v. State (Tex. Crim. App.), 74 S. W. 769.

<sup>323</sup> Johnson v. Moffett, 19 Mo. App. 159.

<sup>324</sup> Mason v. Fuller, 45 Vt. 29.

destroyed before they had seen them, but which had been fully described to them;<sup>325</sup> and nurses may testify as to whether a child is premature,<sup>326</sup> and as to the value of services in nursing and caring for the sick.<sup>327</sup> But a nurse should not be permitted to give opinion evidence as to matters strictly for the medical profession.<sup>328</sup>

Oysterman may testify as to proper material for the bed of oyster grounds.<sup>329</sup> Pavers skilled in their trade are experts as to matters of technical skill relating to their trade. Thus, pavers may give testimony as to the number of bricks laid in a pavement as computed by the square yard.<sup>330</sup> So painters may testify as to the proper and usual way of removing paint from a building.<sup>331</sup>

Pilots, it has been held, may give their opinions as to whether a certain person was proper to take charge of a boat;<sup>332</sup> police officers, in a certain case, as to whether a bond was genuine or a forgery;<sup>333</sup> pork-packers as to proper method of packing hams;<sup>334</sup> publisher as to price for advertising;<sup>335</sup> rafters as to whether logs could be rafted in a certain time;<sup>336</sup> road builders as to the necessity of placing a railing at a given point;<sup>337</sup> saw-mill hands whether a guard should be placed around certain gearing;<sup>338</sup> school commissioner and superintendent as to whether certain supplies were necessary and useful for a school;<sup>339</sup> scientific men as to whether damage to goods in the hold of a vessel was produced by the evaporation of spirits in a cask;<sup>340</sup> and shipmasters and shipwrights as to the discovery of decayed timber

<sup>325</sup> *Whitbeck v. N. Y. &c. R. Co.*  
36 Barb. (N. Y.) 644.

<sup>326</sup> *Mason v. Fuller*, 45 Vt. 29.

<sup>327</sup> *Shafer v. Dean's Adm'r*, 29  
Iowa, 144.

<sup>328</sup> *Dashiell v. Griffith*, 84 Md. 363,  
35 Atl. 1094.

<sup>329</sup> *Lewis v. Hartford Dredging*  
Co. 68 Conn. 221.

<sup>330</sup> *Mayor v. O'Neill*, 1 Pa. St. 342.  
See, also, *Barber Asphalt Pav. Co.*  
*v. Howcott*, 109 La. Ann. 692, 33  
So. 734.

<sup>331</sup> *First Cong. Church v. Hol-*  
*yoke, &c. Ins. Co.* 158 Mass. 475, 33  
N. E. 572.

<sup>332</sup> *Hill v. Sturgeon*, 28 Mo. 323.  
But opinion evidence as to the  
competency or incompetency of an  
employee is not always admitted

and would seem to be inadmissible  
in an action by another employe  
for a personal injury, for instance,  
where that is the very issue to be  
determined.

<sup>333</sup> *State v. Norton*, 76 Mo. 180.

<sup>334</sup> *Leopold v. Van Kirk*, 29 Wis.  
548.

<sup>335</sup> *Palmer v. White*, 10 Cush.  
(Mass.) 321.

<sup>336</sup> *Long v. McCauley* (Tex. Sup.),  
3 S. W. 689.

<sup>337</sup> *Taylor v. Monroe*, 43 Conn. 36.

<sup>338</sup> *Peterson v. Johnson-Went-*  
*worth Co.* 70 Minn. 538, 73 N. W.  
510.

<sup>339</sup> *Litton v. Wright Tp.* 127 Ind.  
81, 27 N. E. 329.

<sup>340</sup> *Turner v. Black Warrior*, 1  
McAll. 181.

in a vessel.<sup>341</sup> Steam fitters may testify as to the cause of the explosion of a steam pipe,<sup>342</sup> and as to the strength of iron,<sup>343</sup> but a steam fitter who had never been an engineer nor an operator of a steam plant was held, in a recent case, not to be qualified to give his opinion as to what would have to be done to the plant in question to prevent an explosion such as had occurred.<sup>344</sup> Subscribing witnesses may give their opinions as to the testator's capacity.<sup>345</sup> Tailors may testify in a proper case as to whether a pocket-book could have been secured through a hole (subsequently mended) cut in a coat.<sup>346</sup> Taners may testify as to the mode of tanning hides,<sup>347</sup> and as to the durability of leather which has been tanned in a certain way.<sup>348</sup> Tile-makers may give their opinions in evidence as to the proper way of placing tile in a kiln;<sup>349</sup> and tobacco dealers as to the proper method of examining a case of tobacco.<sup>350</sup> So truckmen may testify as to within what space a certain truck could be stopped.<sup>351</sup>

It has also been held that weather bureau officers may give their opinion that a certain amount of rain had fallen before a certain time,<sup>352</sup> and that wood-workers may state whether two pieces of wood are parts of the same stick of natural growth.<sup>353</sup>

<sup>341</sup> *Cook v. Castner*, 9 Cush. (Mass.) 266.

<sup>342</sup> *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, 48 N. E. 188.

<sup>343</sup> *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

<sup>344</sup> *Paul E. Wolff Shirt Co. v. Frankenthal*, 96 Mo. App. 307, 70 S. W. 378.

<sup>345</sup> *Matter of Potter*, 17 N. Y. App. Div. 267; *Melanefy v. Morrison*, 152 Mass. 473; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. R. 441; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691. But see as to the effect of signing as a subscribing witness and the propriety of an instruction on the subject, where the witness subsequently undertakes to testify against testamentary capacity.

*Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, and authorities there reviewed.

<sup>346</sup> *People v. Morrigan*, 29 Mich. 5.

<sup>347</sup> *Bearss v. Copley*, 10 N. Y. 93.

<sup>348</sup> *Nelson v. Wood*, 62 Ala. 175.

<sup>349</sup> *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

<sup>350</sup> *Atwater v. Clancy*, 107 Mass. 369.

<sup>351</sup> *O'Neill v. Dry Dock, &c. R. Co.* 129 N. Y. 125, 29 N. E. 84. The court, however, said that this was a class of testimony not to be encouraged, and that it was "barely competent."

<sup>352</sup> *Roe v. Mayor*, 4 N. Y. S. 447.

<sup>353</sup> *Commonwealth v. Choate*, 105 Mass. 456.

## CHAPTER LI.

### PHYSICIANS AND SURGEONS.

Sec.		Sec.	
1078.	Physicians and surgeons as experts—Competency.	1087.	Opinions as to cause of death.
1079.	Unlicensed medical men—Competency.	1088.	Opinions as to effect of injuries.
1080.	Subjects of expert testimony of medical men.	1089.	Opinions as to effect of medicine or treatment.
1081.	Opinions as to disease.	1090.	Opinions as to poisons and blood stains.
1082.	Opinions as to suffering and pain.	1091.	Opinions as to insanity.
1083.	Opinions as to mental condition.	1092.	Opinions as to sexual intercourse.
1084.	Opinions as to physical condition.	1093.	Opinions as to the probability of recovery.
1085.	Opinions as to wounds.	1094.	Opinions as to position or distance in case of a wound or injury.
1086.	Opinions as to cause of injury.	1095.	Miscellaneous.

§ 1078. Physicians and surgeons as experts—Competency.—Physicians and surgeons of practice and experience form a large class of those who are competent to give expert testimony in a proper case. In the absence of any statutory requirement, it is not essential that a physician or surgeon offered as an expert should be a graduate or have a license to practice,<sup>1</sup> nor is it necessary that the witness should have studied any particular system of medicine.<sup>2</sup> It is not

<sup>1</sup> New Orleans, &c. R. Co. v. Allbritton, 38 Miss. 242.

<sup>2</sup> Corsi v. Maretzek, 4 E. D. Smith (N. Y.) 1. But see as to incom-

petency of those of another school in case of alleged malpractice. Martin v. Courtney, 75 Minn. 255, 77 N. W. 813.

a necessary qualification that he be engaged in the practice at the time,<sup>3</sup> nor, ordinarily, that he be a specialist in a certain line.<sup>4</sup> If he is a specialist, however, and has no experience beyond his specialty, he is incompetent to express an opinion not within the bounds of his specialty.<sup>5</sup> He may be competent by study without practice,<sup>6</sup> or by practice without study.<sup>7</sup> The opinion of a physician may be based on personal examination made by himself,<sup>8</sup> or upon a hypothetical state of facts.<sup>9</sup> In some jurisdictions, however, the courts seem inclined to hold, at least on the question of insanity, that where the physician bases his opinion on a hypothetical state of facts presented to him and not on his own observation, a greater amount of special knowledge is required.<sup>10</sup>

§ 1079. **Unlicensed medical men—Competency.**—As already stated, it is not essential, where no license is required, that the witness should have a license to practice. But, in a recent case, while this was conceded, it was held that a manufacturer of medicines who had pursued a study of medicine was not *prima facie* competent because he was not licensed to practice medicine.<sup>11</sup> And, in the course of the opinion, the court said: "After a careful consideration of the subject we have reached the conclusion that if a man be in reality an expert upon any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. But such testimony should be received with great caution, and only after the trial court has become fully satisfied that upon the

<sup>3</sup> *Everett v. The State*, 62 Ga. 65; *Roberts v. Johnson*, 58 N. Y. 613.

<sup>4</sup> *Hathaway v. National Life Ins. Co.* 48 Vt. 335; *Castner v. Sliker*, 33 N. J. L. 95, 507.

<sup>5</sup> *Fairchild v. Bascomb*, 35 Vt. 398, 410.

<sup>6</sup> *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Fordyce v. Moore* (Tex. Civ. App.), 22 S. W. 235; *State v. Wood*, 53 N. H. 484; *State v. Terrell*, 12 Rich. (S. Car.) 321. Contra, *Soquet v. State*, 72 Wis. 659, 40 N. W. 391.

<sup>7</sup> *Mason v. Fuller*, 45 Vt. 29.

<sup>8</sup> *McClain v. Railroad Co.* 116 N. Y. 459, 22 N. E. 1063; *People v. Tuck*, 170 N. Y. 203, 63 N. E. 281; *Bitner v. Bitner*, 65 Pa. St. 347;

*Skelton v. St. Paul R. Co.* 88 Minn. 192, 92 N. W. 960; *State v. Wright*, 134 Mo. 404, 35 S. W. 1145; *Atchison, &c. R. Co. v. Frazier*, 27 Kans. 463. See post § 1118, as to taking into consideration statements of the patient.

<sup>9</sup> *Luning v. State* (Wis.), 2 Pinney, 215, 1 Chandler, 178, 52 Am. Dec. 153; *Spear v. Richardson*, 37 N. H. 23, 28; *Southern Bell Tel. Co. v. Jordan*, 87 Ga. 69, 13 S. E. 203. Post § 1116.

<sup>10</sup> *Commonwealth v. Rich*, 14 Gray (Mass.) 335; *Russell v. State*, 53 Miss. 367.

<sup>11</sup> *People v. Rice*, 159 N. Y. 400, 54 N. E. 48.

subject as to which the witness is called for the purpose of giving an opinion, he is fully competent to speak. The witness Fennér was not *prima facie* competent, for he had not been licensed to practice medicine. It was essential, therefore, to prove him to be an expert before the defense acquired the right to have him testify as to the sanity or insanity of the defendant." If a valid statute requires a license, and provides that no person shall practice medicine nor testify as an expert concerning diseases unless he has such a license, the court may refuse to permit a physician, although he has been such for many years, to so testify unless he is licensed, or at least unless it is shown that he is a physician with the necessary qualifications.<sup>12</sup> But it would seem that a statute which simply provides that every practicing physician shall obtain a license does not render him incompetent to testify as an expert if he has the necessary qualifications.<sup>13</sup>

§ 1080. **Subjects of expert testimony of medical men.**—It has been said that "the sphere of medical expert testimony is practically co-extensive with the range of medical skill and science,"<sup>14</sup> and, viewing the subject in a loose and general way, this is true. The symptoms, causes, treatment, duration and probable results of diseases, wounds and personal injuries, and both the physical and mental conditions of persons may be said to be within the sphere of expert opinion on the part of medical men, and they are usually permitted, when qualified, to give their opinion on these and kindred subjects in proper cases.<sup>15</sup> But it is not to be understood that their opinions are, ordinarily, admissible any more than those of other witnesses upon facts of ordinary knowledge and observation or upon the exact issue to

<sup>12</sup> *McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493. See, however, *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924, 928.

<sup>13</sup> He might, for instance, have the necessary qualifications by previous study or even by previous practice, as well as study, and still not have a license because he may not choose to practice at the particular time, or for some other reason.

<sup>14</sup> Note in 66 Am. Dec. 235.

<sup>15</sup> *Roberts v. Fleming*, 31 Ala. 683; *Brant v. Lyons*, 60 Iowa, 172, 14 N. W. 227; *Parker v. Johnson*, 25

Ga. 576; *Gilman v. Strafford*, 50 Vt. 723; *Jones v. White*, 11 Humph. (Tenn.) 268; *State v. Clark*, 15 S. Car. 403; *Shelton v. State*, 34 Tex. 662; *Ebos v. State*, 34 Ark. 520; *Davis v. State*, 38 Md. 15; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Doegling v. State*, 56 Wis. 586; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *Dejarnette v. Commonwealth*, 75 Va. 869; *Young v. Makepeace*, 103 Mass. 50; *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Bowers v. State* (Wis.), 99 N. W. 447; *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409,

be decided by the jury; and the opinions of physicians and surgeons are admissible in general only under the same rules and limitations as those of other witnesses who are claimed to be experts.<sup>16</sup> When, therefore, it is said that their opinions are admissible as to the cause of an injury, or the like, it is not meant that they may give their opinion, in a personal injury case, for instance, that the injury was caused by the negligence of the defendant, or the like, although some courts have allowed experts to go almost that far in giving their opinions. Many of the cases upon this subject are reviewed in a recent decision by the Supreme Court of Illinois, in which it is held that in an action by a railroad employé against the company for personal injuries, the opinions of physicians who examined the plaintiff immediately after the injury that his foot must have been injured by coming in contact with two uneven surfaces was held inadmissible, the court saying that this was the very matter at issue for the jury to determine, and that such testimony was in the nature of direct testimony as to how the injury occurred and what caused it rather than expert testimony.<sup>17</sup>

3 N. E. 389; *Reed v. Pennsylvania R. Co.* 56 Fed. 184; *Filer v. New York Cent. R. Co.* 49 N. Y. 42; *Matteson v. New York, &c. R. Co.* 35 N. Y. 487; *Fay v. Swan*, 44 Mich. 544; *People v. Sessions*, 58 Mich. 594; *State v. Pike*, 65 Me. 111; *O'Mara v. Commonwealth*, 75 Pa. St. 424. See, also, note in 22 Cent. Law Jour. 328, 329.

<sup>16</sup> An opinion as to what might be the result of a certain injury, rather than as to what would be, or was reasonably certain to be, the result, was held, in a recent case, to be too speculative. *Briggs v. New York, &c. R. Co.* 177 N. Y. 59, 69 N. E. 223. See as to an opinion as to probability held not too speculative. *Western U. Tel. Co. v. Church (Neb.)*, 90 N. W. 878, 57 L. R. A. 905.

<sup>17</sup> *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608, 70 N. E. 628. The court cites *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245, in which it was held

that physicians should not be allowed to testify in a murder case as to whether wounds found upon the deceased were such as would likely have been inflicted upon a person, while living, by being struck by a railroad train running at the rate of thirty-five miles an hour, and in which numerous other authorities upon the general subject are cited; *Treat v. Merchants' Life Ass'n*, 198 Ill. 431, 64 N. E. 992, where in an action on an insurance policy, the defense being suicide, it was held that a physician could not give his opinion as to whether the wound was accidentally or purposely inflicted; *State v. Rainsbarger*, 74 Iowa, 196, 37 N. W. 153, in which opinions of physicians as to how wounds were probably made was excluded; *People v. Hare*, 57 Mich. 505, 512, 24 N. W. 843, where the opinion of a physician as to what actually caused a wound was excluded;

§ 1081. **Opinions as to disease.**—Medical experts may testify as to disease. They may give their opinions as to the nature of a disease;<sup>18</sup> as to its effects upon the general health;<sup>19</sup> as to how long one has been afflicted;<sup>20</sup> whether fright will produce heart disease;<sup>21</sup> as to exposure to a contagious disease,<sup>22</sup> and as to how one took a contagious disease.<sup>23</sup> They may also testify as to the duration of a disease;<sup>24</sup> as to whether stagnant water might cause malarial fever;<sup>25</sup> as to whether a disease may be cured;<sup>26</sup> as to the severity and ordinary duration of the disease;<sup>27</sup> as to whether a disease is contagious;<sup>28</sup> as to any appearance of disease in the family of a particular person,<sup>29</sup> and as to the proportion of patients who recover from a particular disease.<sup>30</sup> They may also state their opinions as to whether a disease is of a temporary or permanent nature,<sup>31</sup> and as to the causes, symptoms and peculiarities of a disease.<sup>32</sup>

§ 1082. **Opinions as to suffering and pain.**—When it is not clear from outward appearances that one is suffering with pain, medical

*Cannon v. People*, 141 Ill. 270, 30 N. E. 1027, to much the same effect, and many other decisions laying down the same rule, but involving the opinions of experts who were not physicians. Several other Illinois cases and the case of *Lacas v. Detroit City R. Co.* 92 Mich. 412, 52 N. W. 745, are distinguished upon the ground that the opinion asked for in those cases was as to what might have caused the wound or injury, and not as to what did cause it. See, also, the recent case of *Summerlin v. Carolina, &c. R. Co.* 133 N. Car. 550, 45 S. E. 898. But see post § 1086.

<sup>18</sup> *Pidcock v. Potter*, 68 Pa. St. 342; *Linton v. Hurley*, 14 Gray (Mass.) 191.

<sup>19</sup> *Filer v. N. Y. Central R. Co.* 49 N. Y. 42; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. R. 131; *Reed v. City of Madison*, 85 Wis. 667.

<sup>20</sup> *Edgington v. Aetna Life Ins. Co.* 77 N. Y. 564.

<sup>21</sup> *Illinois Central R. Co. v. Lattimer*, 128 Ill. 163, 21 N. E. 7.

<sup>22</sup> *Smith v. Emery*, 11 N. Y. App. Div. 10.

<sup>23</sup> *Kliegel v. Aitken*, 94 Wis. 432, 69 N. W. 67, 35 L. R. A. 249.

<sup>24</sup> *Knox v. Wheelock*, 56 Vt. 191; *Eckles v. Bates*, 26 Ala. 655; *Lush v. McDaniel*, 13 Ired. L. (35 N. Car.) 485, 57 Am. Dec. 566.

<sup>25</sup> *Enfaula v. Simmons*, 86 Ala. 515.

<sup>26</sup> *Matteson v. New York Central R. Co.* 35 N. Y. 487, 91 Am. Dec. 67.

<sup>27</sup> *Linton v. Hurley*, 14 Gray (Mass.) 191.

<sup>28</sup> *Moore v. State*, 17 Ohio St. 521.

<sup>29</sup> *Morrissey v. Ingham*, 111 Mass. 63.

<sup>30</sup> *Cole v. Lake Shore R. Co.* 95 Mich. 77, 54 N. W. 638.

<sup>31</sup> *Matteson v. New York Cent. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67; *Goshen v. England*, 119 Ind. 368, 21 N. E. 977; *Rowell v. Lowell*, 11 Gray (Mass.) 420.

<sup>32</sup> *Batten v. State*, 80 Ind. 394; *State v. Powell*, 7 N. J. L. 244; *Stouter v. Manhattan R. Co.* 127 N. Y. 661, 27 N. E. 805.



men may sometimes express their opinions as to such matter. Thus, they may state as to whether one still suffers pain resulting from personal injuries;<sup>33</sup> as to whether patients with amputated limbs frequently suffer pain as if it were in the amputated parts.<sup>34</sup> It has also been held that a physician may give an opinion as to whether a person is simulating,<sup>35</sup> but this has been denied.<sup>36</sup>

**§ 1083. Opinions as to mental condition.**—Medical men may usually express their opinions in a proper case as to the mental condition of a person. Thus, it has been held that they may give expert testimony that a person had sufficient mental capacity to make a certain statement;<sup>37</sup> that one is in a certain mental condition;<sup>38</sup> that the mind of old persons may become impaired through paralysis,<sup>39</sup> and whether at certain times in the life of a woman she is more subject to derangement of the mental condition.<sup>40</sup>

**§ 1084. Opinions as to physical condition.**—The opinions of medical men may also be received as to the physical condition of an individual.<sup>41</sup> Thus, they may testify as to whether a woman was or is pregnant;<sup>42</sup> whether a man at a certain age and in a certain condition could engender offspring,<sup>43</sup> and the physical condition of a woman immediately after she had been robbed.<sup>44</sup> So, they may give their opinions as to whether the physical condition of one was such as to stand an operation without the use of chloroform,<sup>45</sup> and that the physical condition of a woman's parts indicated sexual intercourse.<sup>46</sup>

**§ 1085. Opinions as to wounds.**—Physicians may give their opin-

<sup>33</sup> *Holman v. Union St. R. Co.* 114 Mich. 208, 72 N. W. 202.

<sup>34</sup> *Hickenbottom v. Delaware, &c. R. Co.* 122 N. Y. 91, 25 N. E. 279.

<sup>35</sup> *Chicago, &c. R. Co. v. Martin*, 112 Ill. 16; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *State v. Hayden*, 51 Vt. 296; *Austin, &c. R. Co. v. McElmurry* (Tex. Civ. App.), 33 S. W. 249.

<sup>36</sup> *Cole v. Lake Shore, &c. R. Co.* 95 Mich. 77, 54 N. W. 638.

<sup>37</sup> See, also, *Insanity*, post § 1091. *People v. Brown* (Cal.), 13 Pac. 222. But this is not without limits.

<sup>38</sup> *State v. Pritchett*, 106 N. Car. 667, 11 S. E. 357; *In re Blakely*, 48 Wis. 294; *Faulkner v. Faulkner*, 84

Ga. 73, 10 S. E. 504; *Davis v. State*, 35 Ind. 496.

<sup>39</sup> *Lord v. Beard*, 79 N. Car. 5.

<sup>40</sup> *Titus v. Gage* (Vt.), 39 Atl. 246.

<sup>41</sup> *Quaife v. Railroad Co.* 48 Wis. 513; *Spear v. Hiles*, 67 Wis. 367; *Kennedy v. Upshaw*, 66 Tex. 442.

<sup>42</sup> *State v. Smith*, 32 Me. 370.

<sup>43</sup> *Johnson v. Castle*, 63 Vt. 452, 21 Atl. 534.

<sup>44</sup> *Commonwealth v. Flynn*, 165 Mass. 153, 42 N. E. 562.

<sup>45</sup> *Missouri, &c. R. Co. v. Wright* (Tex. Civ. App.), 47 S. W. 56.

<sup>46</sup> *Commonwealth v. Lynes*, 142 Mass. 577, 8 N. E. 408.

ions as to the cause of certain wounds;<sup>47</sup> as to the character of the instrument used in inflicting the wound;<sup>48</sup> as to the size of a bullet,<sup>49</sup> and as to the force necessary to produce a certain wound.<sup>50</sup> Their testimony may be based upon a description of the wound given in court by those who saw it,<sup>51</sup> as embodied in a proper question. It has been held that they may state their opinions as to the direction whence a blow came to inflict a certain wound,<sup>52</sup> and whether the wound was inflicted while the victim was still alive.<sup>53</sup> They may be questioned as to what kinds of weapons might cause wounds of a certain description, but not, ordinarily, as to how certain wounds were really made;<sup>54</sup> although it has been held that surgeons may give their opinion as to which of two wounds, either of which was by itself necessarily fatal, actually caused death.<sup>55</sup>

**§ 1086. Opinions as to cause of injury.**—They may state their opinions as to whether an injury might have been caused by one being hurled from a vehicle<sup>56</sup> or by a collision;<sup>57</sup> that a person was injured and the nature of the injury;<sup>58</sup> that injury may have been caused by one being thrown from a car;<sup>59</sup> that injury was the result of a shock,<sup>60</sup> and whether a blow with a club could produce certain effects.<sup>61</sup> They may also give their opinion that an abscess was caused by a certain

<sup>47</sup> *State v. Cross*, 68 Iowa, 180; *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074. For limitations, however, see ante § 1080 and post § 1086.

<sup>48</sup> *Carthaus v. State*, 78 Wis. 560; *Bowers v. State* (Wis.), 99 N. W. 447; *Batten v. State*, 80 Ind. 394; *State v. Porter*, 34 Iowa, 131; *Davis v. State*, 38 Md. 15, 35; *State v. Pike*, 65 Me. 111; *Prince v. State*, 100 Ala. 144, 46 Am. St. 28.

<sup>49</sup> *People v. Wong Chuey*, 117 Cal. 624.

<sup>50</sup> *People v. Fish*, 125 N. Y. 136, 147.

<sup>51</sup> *State v. Powell*, 7 N. J. L. 295; *Page v. State*, 61 Ala. 16.

<sup>52</sup> *Kennedy v. People*, 39 N. Y. 245; *Hopt v. Utah*, 120 U. S. 430. Contra: *People v. Smith*, 93 Cal. 445; *Williams v. State*, 30 Tex. App. 429, and see post § 1094.

<sup>53</sup> *People v. Willson*, 109 N. Y. 345; *Shelton v. State*, 34 Tex. 662.

<sup>54</sup> *State v. Rainsbarger*, 74 Iowa, 196; *Rowell v. Lowell*, 11 Gray (Mass.) 420. Contra: *State v. Lee*, 65 Conn. 265.

<sup>55</sup> *Eggler v. People*, 56 N. Y. 642. See, also, *Boyle v. State*, 61 Wis. 440.

<sup>56</sup> *People v. Hare*, 57 Mich. 505; *Filer v. N. Y. Cent. R. Co.* 49 N. Y. 42.

<sup>57</sup> *McDonald v. New York, &c. R. Co.* 13 N. Y. Misc. 651.

<sup>58</sup> *Austin, &c. R. Co. v. McElmurry* (Tex. Civ. App.), 38 S. W. 249.

<sup>59</sup> *State v. Ranssbarger*, 74 Iowa, 196.

<sup>60</sup> *Tyler S. E. R. Co. v. Wheeler* (Tex. Civ. App.), 41 S. W. 517.

<sup>61</sup> *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629.

injury;<sup>62</sup> as to the cause of a miscarriage;<sup>63</sup> that a blow from a chair could have caused the injury;<sup>64</sup> whether a fall from a vehicle could cause an injury of a certain nature;<sup>65</sup> whether blows from a gun could cause certain fractures;<sup>66</sup> whether injury caused by an accidental fall into a sink;<sup>67</sup> and that the injury could have been caused by coming in contact with electric wire<sup>68</sup> or by a railway collision;<sup>69</sup> but, as already shown, they cannot, in many jurisdictions, give their opinion as to what actually caused the injury where this is the very question for the jury to decide. They may give their opinions as to effect of caustic soda on the eye after two weeks has elapsed.<sup>70</sup>

§ 1087. **Opinions as to cause of death.**—Physicians may give expert testimony as to the cause of death. Their testimony may be based either upon personal knowledge or upon a statement of the symptoms as testified to by others.<sup>71</sup> They may give their opinion that death was caused by drowning,<sup>72</sup> poisoning,<sup>73</sup> by a blow,<sup>74</sup> by a wound,<sup>75</sup> by bruises and laceration,<sup>76</sup> or by suffocation.<sup>77</sup> A physician may give his opinion that a certain blow was sufficient to have caused death;<sup>78</sup> that death was a result of wounds and not of an operation,<sup>79</sup> and that death was due to pneumonia brought on by an assault;<sup>80</sup> but not as to whether death was caused by suicide where that is the very issue to be tried.<sup>81</sup>

<sup>62</sup> *Stouter v. R. Co.* 127 N. Y. 661, 27 N. E. 805.

<sup>63</sup> *McKeon v. R. Co.* 94 Wis. 477, 35 L. R. A. 752.

<sup>64</sup> *Kirk v. State* (Tex. Cr. App.) 37 S. W. 440.

<sup>65</sup> *Quinn v. O'Keeffe*, 41 N. Y. S. 116.

<sup>66</sup> *Gardiner v. People*, 6 Park. C. C. 155, 202.

<sup>67</sup> *Davis v. State*, 38 Md. 15, 37.

<sup>68</sup> *Block v. Railroad Co.* 89 Wis. 371, 61 N. W. 1101.

<sup>69</sup> *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320. See, also, *Louisville, &c. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573.

<sup>70</sup> *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074.

<sup>71</sup> *Boyle v. State*, 61 Wis. 440; *Commonwealth v. Crossmire* 156 Pa.

St. 304; *Hunter v. State*, 30 Tex. App. 314.

<sup>72</sup> *People v. Hare*, 57 Mich. 506; *People v. Barker*, 60 Mich. 277. Or that the absence of water in the stomach indicated that drowning was not the cause of death. *State v. Wilcox*, 132 N. Car. 1120, 44 S. E. 625.

<sup>73</sup> *Mitchell v. State*, 58 Ala. 417.

<sup>74</sup> *Ebos v. State*, 34 Ark. 520.

<sup>75</sup> *Powell v. State*, 13 Tex. App. 244, 254.

<sup>76</sup> *Shelton v. State*, 34 Tex. 662.

<sup>77</sup> *People v. Foley*, 64 Mich. 148.

<sup>78</sup> *State v. Powell*, 7 N. J. L. 244, 249; *Curry v. State*, 5 Neb. 412, 417.

<sup>79</sup> *Hunter v. State*, 30 Tex. App. 314.

<sup>80</sup> *State v. Chiles*, 44 S. Car. 338.

<sup>81</sup> *Ætna Life Ins. Co. v. Kaiser*

§ 1088. **Opinions as to effect of injuries.**—Medical men may give in evidence their opinion as to the effect of injuries. Thus, they may make a statement that an injury on a person's breast endangers his life;<sup>82</sup> as to what bones were broken;<sup>83</sup> as to the serious effects of strains;<sup>84</sup> as to the probable effect of a certain injury,<sup>85</sup> and as to effect of injuries on the mind and general health of one.<sup>86</sup> So, also, as to the effect of sudden death upon the muscles;<sup>87</sup> as to an injury causing inability to breathe through the nose;<sup>88</sup> as to the effect upon the spinal cord of a wrench of the backbone;<sup>89</sup> as to the effect of injuries described on a pregnant woman;<sup>90</sup> as to the effect of violent pressure on the neck with the foot of another,<sup>91</sup> and as to whether an injury may not cause suffering from rheumatism.<sup>92</sup>

§ 1089. **Opinions as to effect of medicine or treatment.**—Physicians may give in evidence in a proper case their opinions as to the effect of a medicine or a treatment. Thus they may state the effect of laudanum on the constitution;<sup>93</sup> as to the effect, in certain cases, of another physician's treatment;<sup>94</sup> as to the effects of a certain mixture upon a pregnant woman;<sup>95</sup> as to the effect of morphine on the mind,<sup>96</sup> and as to the general effects of strychnine.<sup>97</sup> And a surgeon may give his opinion in a proper case that the point selected for an amputation

(Ky.), 74 S. W. 203; *Treat v. Merchants' Life Ass'n*, 198 Ill. 431, 64 N. E. 992. But see *Endowment Rank v. Steele* (Tenn.), 69 S. W. 336.

<sup>82</sup> *Rumsey v. People*, 19 N. Y. 42.

<sup>83</sup> *Goshen v. England*, 119 Ind. 35, 368, 21 N. E. 977.

<sup>84</sup> *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322.

<sup>85</sup> *Illinois Central R. Co. v. Treat*, 75 Ill. App. 327; *Griswold v. Railroad Co.* 44 Hun (N. Y.) 236.

<sup>86</sup> *Montgomery v. Scott*, 34 Wis. 338.

<sup>87</sup> *Washburn v. Nat. Acc. Co.* 10 N. Y. S. 366.

<sup>88</sup> *Morgenstein v. Nejedlo*, 79 Wis. 388, 48 N. W. 652.

<sup>89</sup> *Quinn v. O'Keeffe*, 41 N. Y. S. 116.

<sup>90</sup> *State v. Ginger*, 80 Iowa, 574, 46 N. W. 657.

<sup>91</sup> *Williams v. State*, 64 Md. 384, 1 Atl. 887.

<sup>92</sup> *Lago v. Walsh*, 98 Wis. 348, 74 N. W. 212. 'So, it has been held that a physician may give his opinion as to how the injury will affect the ability to perform labor. *Palmer v. Warren St. R. Co.* 206 Pa. St. 574, 56 Atl. 49, 63 L. R. A. 507. Opinion as to what might result held too speculative in *Briggs v. New York, &c. R. Co.* 177 N. Y. 59, 69 N. E. 223.

<sup>93</sup> *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

<sup>94</sup> *Barber v. Merriam*, 11 Allen (Mass.) 322; *Wright v. Hardy*, 22 Wis. 348; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376.

<sup>95</sup> *State v. Slagle*, 83 N. Car. 630.

<sup>96</sup> *State v. Robinson*, 12 Wash. 491, 41 Pac. 884.

<sup>97</sup> *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 783.

was too high.<sup>98</sup> In a recent case, it is held that in an action for malpractice a physician or surgeon is entitled to have his treatment tested by the rules and principles of the school to which he belongs, and that a witness belonging to a hostile school is incompetent to give an opinion that the treatment was improper.<sup>99</sup> But in a still more recent case, the same court held that this rule does not apply to a physician who has applied X-rays to locate a foreign subject in the body of his patient and not for medical purposes.<sup>100</sup> And in another case, decided by another court, it is held that in an action for malpractice by a magnetic healer, a practicing physician is competent to testify as to whether the treatment was skillfully or negligently administered, although he did not claim to possess any magnetic power of healing.<sup>101</sup>

**§ 1090. Opinions as to poisons and blood stains.**—Medical men who are duly qualified may state their opinions as to the nature and effects of poisons.<sup>102</sup> The courts of some jurisdictions apply the rule as to this testimony more strictly than as to other testimony, holding that the knowledge of the medical man as to the poison must have been derived from experience or personal observation.<sup>103</sup> But this is denied in other jurisdictions,<sup>104</sup> and it would seem that a physician may have the necessary qualifications, at least if he has made a special study of the subject, although he may have had no particular experience; but it is held in a recent case that it is insufficient to merely show that he is a licensed and practicing physician.<sup>105</sup> It has been held that one who is not an expert may testify that a stain in question resembles blood,<sup>106</sup> and physicians who have made no microscopical examination, or have had no particular experience in that line have frequently been

<sup>98</sup> *Wright v. Hardy*, 22 Wis. 348.

<sup>99</sup> *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813.

<sup>100</sup> *Henslin v. Wheaton* (Minn.), 97 N. W. 882.

<sup>101</sup> *Longan v. Weltmer* (Mo.), 79 S. W. 655. The court refused to decide whether the opinion usurped the province of the jury, because no proper objection was made on that ground.

<sup>102</sup> *Mitchell v. State*, 58 Ala. 417; *State v. Terrell*, 12 Rich. (S. Car.) 321.

<sup>103</sup> *Cole v. Clarke*, 3 Wis. 323;

*Sheldon v. Booth*, 50 Iowa, 209; *Soquet v. State*, 72 Wis. 659, 40 N. W. 391.

<sup>104</sup> *People v. Thacker*, 108 Mich. 652, 66 N. W. 562. See, also, *Siebert v. State*, 143 Ill. 571, 32 N. E. 431.

<sup>105</sup> *State v. Simons*, 39 Ore. 111, 65 Pac. 595.

<sup>106</sup> *People v. Deacons*, 109 N. Y. 374; *People v. Gonzalez*, 35 N. Y. 49, 61. See, also, *Thomas v. State*, 67 Ga. 460; *Dillard v. State*, 58 Miss. 368; *McLain v. Commonwealth*, 99 Pa. St. 86.

permitted to so testify;<sup>107</sup> but it would seem that to determine whether the blood is that of a human being or some domestic animal or the like is a matter of science requiring an expert, and, while an ordinary physician or surgeon may have some knowledge upon the subject, and would undoubtedly be competent to state that stain which he had seen resembled blood, it would seem that before he should be permitted to give an opinion that it is human blood as distinguished from other blood he ought to be shown to have some special skill or knowledge in regard to the subject, at least when he bases his opinion upon a hypothetical case.<sup>108</sup>

**§ 1091. Opinions as to insanity.**—There is a diversity of opinion as to whether a medical man should have made a special study of insanity in order to give expert testimony, especially when in answer to a hypothetical question. Most jurisdictions hold that it is not necessary that he should have made the subject of insanity a specialty, and that a qualified general practitioner of medicine may give his opinion as to the sanity of an individual.<sup>109</sup> There are some jurisdictions, however, in which the contrary view is taken.<sup>110</sup> The best view is that which admits the opinion of a general practitioner. One court<sup>111</sup> makes the following clear statement of this view where the opinion is based on personal observation: "We think the settled practice of this commonwealth has been to admit the opinion

<sup>107</sup> *People v. Smith*, 106 Cal. 73, 39 Pac. 40; *State v. Warren*, 41 Ore. 348, 69 Pac. 679; *State v. Knight*, 43 Me. 11; *Lindsay v. People*, 63 N. Y. 143; *White v. State*, 133 Ala. 122, 32 So. 139.

<sup>108</sup> See *People v. Deacons*, 109 N. Y. 374, 382; *Reese Med. Jur.* 132; *Med. Leg. Jour.* September, 1892. Compare, also, *Commonwealth v. Sturtivant*, 117 Mass. 122; *Knoll v. State*, 55 Wis. 249. Unless a microscopic examination has been made it would seem difficult, if not impossible, to determine the matter. See generally 10 Cent. Law Jour. 183.

<sup>109</sup> *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Matter of Mullin*, 110 Cal. 252, 42 Pac. 645;

*Davis v. United States*, 165 U. S. 373, 17 Sup. Ct. 360; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443; *Commonwealth v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228; *McAlister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Guetig v. State*, 66 Ind. 94, 32 Am. R. 99; note in 39 L. R. A. 305.

<sup>110</sup> *Russell v. State*, 53 Miss. 367; *Reed v. State*, 62 Miss. 405; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. 352; *Commonwealth v. Rich*, 14 Gray (Mass.) 335; *Reese Med. Jur.* 19. See, also, *Bishop v. Commonwealth*, 109 Ky. 558, 58 S. W. 817, 60 S. W. 190.

<sup>111</sup> *Baxter v. Abbott*, 7 Gray (Mass.) 71.

of educated practicing physicians upon subjects of medical science. Until quite a recent period the disease of insanity has not been made a specialty. That it is now made a special study by a small number of physicians may be a good reason for giving to their opinion greater weight; but it is not a sufficient reason for excluding the opinions of other physicians. It is well known that various classes of diseases, as those of the spine, the eye, the ear, the skin have become specialties, especially in our larger cities, where such division of labor becomes practicable. But this fact does not render incompetent upon these subjects the testimony of other physicians who must necessarily have less experience. The difference is in the weight rather than the competency of the testimony. \* \* \* To adopt the limitation made by the rule of the presiding judge would be to confine opinion on questions of insanity to those physicians who have made insanity a special study and pursuit. As most cases of insanity are treated in hospitals and public institutions, the limitation would practically confine parties to physicians who were or had been engaged in those institutions. The number of these is so small and their attendance so difficult to be procured that the limitation would be in effect an exclusion of matters of opinion upon subjects where it is difficult even for the best trained minds to distinguish and adhere to the line which separates opinion from fact. For with respect to the powers and faculties of the mind it is obvious we can directly know nothing. We know them only as they are manifested in action. Nor if the opinions of persons who have made the subject of mental disease a special study could be had, would it be wise to limit matters of opinion exclusively to them? Large as is the debt which science and humanity owe to them, great as are the advantages which spring from the devotion of the mind to special study, a not unfrequent result is—what it used to be said was the mark of a good judge—a tendency to enlargement of jurisdiction. As it is, it cannot be wholly avoided. To put upon the stand a skillful physician (and such an one has never understood the bodies of his patients unless he has known also something of their minds and the action of one upon the other), to get from him the history of his patient, the state of his bodily health, his conversation, conduct, traits of character in sickness and in health, and then to exclude the opinion which, as the result of all, his mind has almost insensibly and necessarily formed, and yet upon this imperfect history of his patient to ask a perfect stranger to that patient to give his opinion of his mental condition, because he has made mental disease a special study, would be to reject the most valuable evidence for that

which, in the nature of things, must be of far less worth."<sup>111\*</sup> It has also been held that physicians may express an opinion as to whether, under a given state of facts, insanity is real or feigned,<sup>112</sup> and as to the effect of suffering upon the sanity of one who has an hereditary predisposition.<sup>113</sup>

§ 1092. **Opinions as to sexual intercourse.**—Medical men may give their opinions as to whether sexual intercourse could have taken place in a described manner;<sup>114</sup> whether the condition of a female's parts indicated sexual intercourse;<sup>115</sup> as to a ravished female whether pregnancy would follow first intercourse,<sup>116</sup> and whether a man of seventy-six could have intercourse and beget a child.<sup>117</sup>

§ 1093. **Opinions as to the probability of recovery.**—Medical men may testify as to the probability of recovery.<sup>118</sup> Thus, they may give their opinions as to the probable length of time injuries will continue;<sup>119</sup> as to whether symptoms are liable to return;<sup>120</sup> whether a mental disease<sup>121</sup> or a physical injury<sup>122</sup> is permanent, and as to whether a wound is mortal.<sup>123</sup> So they may testify as experts as to whether one would recover the use of a limb<sup>124</sup> or his physical powers,<sup>125</sup> and as to how long an injured person might live.<sup>126</sup>

§ 1094. **Opinions as to position or distance in case of a wound or injury.**—There is a conflict of authority as to whether medical men may give their opinions as to the position of a person or the

<sup>111\*</sup> The same court, however, is inclined to limit such opinions to personal observation, if not to that of the family physician. *Hastings v. Rider*, 99 Mass. 625.

<sup>112</sup> *State v. Hayden*, 51 Vt. 296.

<sup>113</sup> *Dejarnette v. Commonwealth*, 75 Va. 867.

<sup>114</sup> *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *People v. Clark*, 33 Mich. 112.

<sup>115</sup> *Commonwealth v. Lyons*, 142 Mass. 577, 8 N. E. 408.

<sup>116</sup> *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363.

<sup>117</sup> *Johnson v. Castle*, 63 Vt. 452, 21 Atl. 534. But see *Ricards v. Safe Deposit, & Co.* 86 Md. 464, 38 Atl. 899, 63 L. R. A. 145.

<sup>118</sup> *King v. Railroad Co.* 26 N. Y. S.

973; *Patterson v. Railroad Co.* 38 Minn. 511, 39 N. W. 485; *Block v. Railroad Co.* 89 Wis. 371.

<sup>119</sup> *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100.

<sup>120</sup> *Filer v. New York Central R. Co.* 49 N. Y. 42.

<sup>121</sup> *State v. Meyers*, 99 Mo. 10, 12 S. W. 516.

<sup>122</sup> *Longworthy v. Green*, 88 Mich. 207, 50 N. W. 130.

<sup>123</sup> *Batten v. State*, 80 Ind. 394.

<sup>124</sup> *Wilt v. Vickers*, 8 Watts (Pa.) 227.

<sup>125</sup> *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 260.

<sup>126</sup> *Alberti v. Railroad Co.* 118 N. Y. 77, 23 N. E. 35.



position of parts of his body when he received a certain injury or wound, or as to his distance from the one inflicting the wound or injury. The better opinion would seem to be that such matters are not, ordinarily, questions of medical skill, but are matters of common observation and matters upon which jurymen are as capable of forming opinions as medical men, since they are not matters of special knowledge,<sup>127</sup> but there may, perhaps, be cases in which from the nature and direction of the wound,<sup>128</sup> a medical expert would be specially qualified to tell from what direction the blow came. One case which upholds the view expressed above contains the following statement: "The admission of the testimony of the coroner, who was a physician, to his opinion respecting the position of the deceased when the blows were given which caused the fatal wounds, is far more questionable. He had described the wounds, he had given their position upon the head, their direction, their length, width and depth. He had been permitted to give, so far as he was able, the shape of the instrument with which the blows were inflicted, and to state that 'striking the scalp from above and backward would make such a gash, in a vertical or slanting direction, a blow from a blunt instrument.' If any other fact was wanting which could guide the judgment in determining the manner of the killing, and which medical or surgical skill could supply, it was competent to inquire further of the witness. Indeed, one of the questions which became the subject of exceptions here insisted upon was, I think, clearly competent in that view, viz.: As to the amount of force requisite to break the skull. He had not only the skill and knowledge resulting from his professional familiarity with anatomy, and the structure, thickness and strength of the human skull generally, but he had the particular knowledge acquired by the examination of the skull of the deceased. That he was competent to speak as an expert of the power and resistance of the skull, and so of the force requisite to break it as it was in this case broken, seems to be quite clear. But here, I think, was an end of the inquiries permissible to draw from him mere opinions. Having stated all this, he was no more competent to give an opinion as to

<sup>127</sup> *Brown v. State*, 55 Ark. 593, 18 S. W. 1081; *Williams v. State*, 30 Tex. App. 447, 17 S. W. 1071; *People v. Smith*, 93 Cal. 445, 29 P. 64; *Perkins v. State*, 5 Ohio C. C. 597; *People v. Lemperle*, 94 Cal. 45, 29 Pac. 709; *Dillard v. State*, 58

Miss. 368. Contra: *State v. Jones*, 68 N. Car. 443; *Fort v. Brown*, 46 Barb. (N. Y.) 366; *Commonwealth v. Lennox*, 3 Brewst. 249; *Perry v. State*, 110 Ga. 234, 36 S. E. 781.

<sup>128</sup> *Kennedy v. People*, 39 N. Y. 245.

the position of the body when struck than any other person. One blow was received by the deceased on the left side of the back of the head. How is it possible that a surgeon can tell better than one who is not a surgeon how the head must be placed so that such a blow can be given? It is entirely obvious that it must be in such a position that it is accessible. In one position it would be easy to reach it; in another it would be difficult; and yet in another it might be impossible. I am not aware that surgeons are experts in the manner of giving blows of that description, or in determining how the head must be placed so as most conveniently to receive them. The form, nature, extent, depth, length, width and direction of the wound being given and its precise location on the head, with a general statement of the amount of force requisite and the probable shape of the instrument, the jury can judge as well as any one in what position the head or body probably was when the blow was given. At best it seems to me there can be nothing more than a conjecture among several suppositions; but surgical skill has little to do with the inquiry. Still less was the position of the body when the blow was given which caused the wound on the top of the head the proper subject for an opinion by the surgeon. Obviously a blow may be given on the top of the head whenever the top of the head is within reach of such a blow from the assailant; it may be when sitting; it may be when lying down. A short man standing might receive such a blow from one who is very tall. When all the facts are stated it must necessarily be nothing but conjecture. It is only when the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind do not enable them to see what inferences should be drawn from the facts, that the witness may supply opinions as their guide. But on what ground it can be said that it requires the peculiar science or professional skill which physicians and surgeons possess to determine the position in which a man may be struck on the top of his head, I am not able to perceive."

§ 1095. **Miscellaneous.**—The different matters concerning which medical men have been allowed to give their opinions in evidence are exceedingly numerous. It would be an almost endless task to enumerate all the matters. Below are given a few taken from the many illustrative cases. Such witnesses have been allowed to give their opinions as to whether a body had been moved after hemorrhage

took place;<sup>129</sup> as to the infectious or contagious character of a disease, how the contagion is carried, and how long it retains its vitality;<sup>130</sup> as to how a gun-shot wound was inflicted;<sup>131</sup> as to the quantity of blood likely to flow from certain wounds;<sup>132</sup> as to the probable effect of a certain course of treatment;<sup>133</sup> as to whether one was prematurely born,<sup>134</sup> and as to the age of one so born;<sup>135</sup> as to the effect of a nervous shock on the physical and mental condition of a certain person,<sup>136</sup> and, in a personal injury case, that, unless a certain dangerous operation was performed, the plaintiff's injury would shorten her life expectancy one half.<sup>137</sup> Medical men may also state whether a certain blow was sufficient to cause death;<sup>138</sup> or whether one may suffer from injuries that are not apparent.<sup>139</sup> So, in a recent case, it was held that a physician, who had performed an autopsy and made an expert examination of the stomach of a deceased person, was competent to testify as to the probable length of time that had intervened between the time such person had eaten his supper and the time of his death.<sup>140</sup> The opinions of medical men are also competent as to whether an abortion has been performed,<sup>141</sup> and as to the many matters in connection therewith. Thus, they have been competent to show whether a certain quantity of a drug would produce an abortion;<sup>142</sup> that certain instruments are fitted for abortive purposes,<sup>143</sup> and as to the means employed.<sup>144</sup> A physician may likewise testify as to whether there has been a miscarriage. He may state what in his opinion was the cause, whether from injuries, exposure

<sup>129</sup> *State v. Merriman*, 34 S. Car. 16, 12 S. E. 620.

<sup>130</sup> *Smith v. Emery*, 42 N. Y. S. 258.

<sup>131</sup> *Rash v. State*, 61 Ala. 89.

<sup>132</sup> *O'Mara v. Commonwealth*, 75 Pa. St. 424.

<sup>133</sup> *State v. Slagle*, 83 N. Car. 630; *Lindsay v. People*, 63 N. Y. 143.

<sup>134</sup> *Young v. Makepeace*, 103 Mass. 50.

<sup>135</sup> *People v. Johnson*, 70 Ill. App. 634.

<sup>136</sup> *Bliss v. New York Central, &c. R. Co.* 160 Mass. 447, 36 N. E. 65.

<sup>137</sup> *Houston Electric Co. v. McDade*, 24 Tex. Civ. App. 127, 79 S. W. 100.

<sup>138</sup> *State v. Powell*, 7 N. J. L. 294.

<sup>139</sup> *Rowell v. City of Lowell*, 11 Gray (Mass.) 420.

<sup>140</sup> *State v. Mortensen*, 26 Utah, 12, 73 Pac. 562.

<sup>141</sup> *State v. Wood*, 53 N. H. 484; *State v. Lee*, 65 Conn. 265, 48 Am. St. 202; *Hauk v. State*, 148 Ind. 238.

<sup>142</sup> *Williams v. State* (Tex. App.), 19 S. W. 897.

<sup>143</sup> *Commonwealth v. Brown*, 121 Mass. 69.

<sup>144</sup> *Commonwealth v. Thompson*, 159 Mass. 56; *State v. Wood*, 53 N. H. 484.

or accident.<sup>145</sup> So, also, as to rape. Thus, he may testify as to whether or not there has been sufficient penetration to constitute rape,<sup>146</sup> and whether in case of rape there may result pregnancy.<sup>147</sup> But not that rape could not be committed on an ordinary mature woman.<sup>148</sup> Physicians may also give their opinions as to malpractice. Thus, they may state whether an amputation was properly performed,<sup>149</sup> and whether a case was skillfully attended.<sup>150</sup> They have been allowed to give opinions concerning animals, as to the causes, nature and effects of diseases among them.<sup>151</sup> On such subjects as the last, however, the opinions of those who practice veterinary medicine and surgery are most often received.<sup>152</sup>

<sup>145</sup> *McKeon v. Chicago, &c. R. Co.*  
94 Wis. 477; *State v. Ginger*, 80  
Iowa, 574.

<sup>146</sup> *Proper v. State*, 85 Wis. 615, 55  
N. W. 1035.

<sup>147</sup> *Young v. Johnson*, 123 N. Y.  
226, 25 N. E. 363.

<sup>148</sup> *State v. Peterson*, 110 Iowa,  
647, 82 N. W. 647.

<sup>149</sup> *Olmsted v. Gere*, 100 Pa. St.  
127; *Wright v. Hardy*, 22 Wis. 348.

<sup>150</sup> *Jones v. Angell*, 95 Ind. 376;  
*Twombly v. Leach*, 11 Cush.  
(Mass.) 397; *Wright v. Hardy*, 22  
Wis. 348.

<sup>151</sup> *House v. Fort*, 4 Blackf. (Ind.)  
293; *State v. Sheets*, 89 N. Car. 543.

<sup>152</sup> See ante § 1075.

## CHAPTER LII.

### SUBJECTS OF EXPERT OPINION.

Sec.		Sec.	
1096.	Generally.	1105.	Comparison of handwriting —When no statute.
1097.	Animals.	1106.	Handwriting—Miscellaneous.
1098.	Damages.	1107.	Insurance.
1099.	Handwriting — Modes of proving.	1108.	Railways and their manage- ment.
1100.	Handwriting—Opinions of non-experts.	1109.	Value—In general.
1101.	Handwriting—Opinions of experts.	1110.	Value—Of personal property.
1102.	Handwriting — Illustrative cases where expert opinion allowed.	1111.	Value—Of real estate.
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1104.	Comparison of handwriting —Under statutes.	1113.	Miscellaneous instances of opinions held admissible.
		1114.	Miscellaneous instances of opinions held inadmissible.

§ 1096. **Generally.**—In the preceding chapters upon various phases of the general subject of expert and opinion evidence, much has necessarily been said as to the matters on subjects in regard to which the opinions of experts are received. In this chapter the view is taken from a different standpoint. In order to avoid repetition, however, only the most important topics will be treated at length, but an attempt will be made to consider all the most important questions upon which such evidence is usually given and to indicate what are and what are not proper subjects for expert testimony. The witness whose opinion is sought to be introduced as that of an expert must not only be qualified to speak as an expert, but the subject itself

must also be one in regard to which expert testimony is admissible. Both of these questions, in the ordinary course, are to be determined by the court in the affirmative before the evidence is admitted.

§ 1097. **Animals.**—Those particularly acquainted with animals and their ways may give their opinions in evidence in a proper case. Thus, they may testify as to the age of cattle;<sup>1</sup> as to the diseases of animals;<sup>2</sup> and as to the number of cattle on a range;<sup>3</sup> as to the number of hogs that could be safely shipped in a car during a certain season of the year, a hog shipper is competent to give an opinion;<sup>4</sup> as to whether it would have been necessary to feed cattle if they had been shipped and expeditiously transferred, a cattle shipper has been allowed to give his opinion;<sup>5</sup> as to the effect of a stampede on the value and appearance of stock, a stockman is competent to state,<sup>6</sup> and farmers who were owners of horses and had bought and sold them were held competent to testify as to the value of a horse in a recent case.<sup>7</sup> So, in an action against a carrier for negligently causing the death of a hunting dog, a witness who testified that he had owned hunting dogs all his life and had a general knowledge by experience of such dogs, was permitted to testify as to the value of the animal.<sup>8</sup> Mere opinion, however, as to such matters relating to animals as are commonly known to men generally, and with which the jury may be supposed to be familiar and competent to judge without the aid of such opinions, are not usually admissible.

§ 1098. **Damages.**—It is a general rule that experts cannot assess

<sup>1</sup> *Clogue v. Hodgson*, 16 Minn. 329.

<sup>2</sup> *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854. See, also, *Wisecarver v. Long*, 120 Iowa, 59. 94 N. W. 467.

<sup>3</sup> *Albright v. Corley*, 40 Tex. 105.

<sup>4</sup> *Wabash, &c. R. Co. v. Pratt*, 15 Ill. App. 177. See, also, *Louisville, &c. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482.

<sup>5</sup> *Gulf, &c. R. Co. v. Irvine* (Tex. Civ. App.) (1903), 73 S. W. 540.

<sup>6</sup> *Cooke v. Kansas City, &c. R. Co.* 57 Mo. App. 471. So as to value of a particular shipment of cattle of which the witness had personal knowledge. *Missouri, &c. R. Co. v. Truskett*, 186 U. S. 479,

22 Sup. Ct. 943; *Louisville, &c. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482.

<sup>7</sup> *Burlington, &c. R. Co. v. Campbell*, 14 Colo. App. 141, 59 Pac. 424. It has also been held that similar testimony is admissible as to whether certain obstructions would frighten a gentle horse. *Moreland v. Mitchell County*, 40 Iowa, 394. See also, *Donnelly v. Fuch*, 136 Mass. 558. But this would seem to be a matter that could ordinarily be determined by the jury. See *Missouri, &c. Tel. Co. v. Vandevort*, 67 Kans. 269, 72 Pac. 771.

<sup>8</sup> *American Express Co. v. Bradford* (Miss.) (1903), 33 So. 843.

damages, as this is a matter for the jury. To draw a conclusion from the evidence as to the amount of damages is the province of the jury, and for this reason opinions directly fixing the amount of damages are usually inadmissible.<sup>9</sup> But there are many authorities to the effect that whenever the question of amount of damages depends entirely on a question of value then an expert may state his opinion. Common instances in which the question arises are in cases of damages to property and in condemnation proceedings. Thus, as to damages to property, the courts of some jurisdictions permit witnesses to testify expressly as to the amount, while in others this is not permitted and the witness testifies as to the value of the property both before and after the injury and leaves it to the jury to determine the amount. In many jurisdictions it is held that in condemnation proceedings witnesses may state their opinions as to the amount of damages.<sup>10</sup> In other jurisdictions it is held that witnesses may go only to the extent of stating the value of the property before and after its condemnation.<sup>11</sup> In a recent case, which was an action

<sup>9</sup> *Newton v. Fordham*, 7 Hun (N. Y.) 57; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Read v. Valley Land, &c. Co.* (Neb.), 92 N. W. 622; *Chicago, &c. R. Co. v. Springfield, &c. R. Co.* 67 Ill. 142; *Bain v. Cushman*, 60 Vt. 343; *Old v. Keener*, 22 Colo. 6, 43 Pac. 127; *Van Deusen v. Young*, 29 N. Y. 27; *Madden v. Railway Co.* 50 Mo. App. 666; *Tingley v. City of Providence*, 8 R. I. 493; *Muldowney v. Railroad Co.* 39 Iowa, 615. This subject of opinion evidence as to damages has already been considered, although not with special reference to experts. See Vol. I, § 674. It is unnecessary, therefore, to cite many of the numerous authorities upon the subject here. It may be said, however, that the question of the measure or amount of damages also involves, as a rule, at least a question of law, and opinions as to the exact amount of damages are perhaps doubly objectionable as be-

ing largely speculative upon a matter for the jury to determine and as involving a conclusion or speculation that is based upon inferences both from facts and from the supposed law, and it may be impossible to tell upon just what the witness based his opinion.

<sup>10</sup> *Snow v. Boston R. Co.* 65 Me. 230; *Portland v. Kam*, 10 Ore. 383; *City of Chicago v. McDonough*, 112 Ill. 85; *Washburn v. Milwaukee R. Co.* 59 Wis. 364; *Diedrich v. Northwestern, &c. R. Co.* 47 Wis. 662; *Swan v. County of Middlesex*, 101 Mass. 173; *Siskiyow County v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Sherman v. St. Paul, &c. R. Co.* 30 Minn. 227; *Texas, &c. R. Co. v. Kirby*, 44 Ark. 103; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Pittsburgh, &c. R. Co. v. Robinson*, 95 Pa. St. 426. See 3 *Elliott on Railroads*, § 1038, for authorities on both sides.

<sup>11</sup> *Cleveland, &c. R. Co. v. Ball*, 5 Ohio St. 568; *Railroad Co. v.*

for damages for breach of contract to purchase the product of a distillery for a term of years, it was held that the defendant was entitled to a deduction for "the less time engaged" and the release from risk and responsibility, and the question arose as to whether the testimony of experts was admissible on that issue. The court held that it was admissible, but that the hypothetical question as tendered to them was too comprehensive in that it sought to substitute them as assessors of the damage in place of the jury.<sup>12</sup>

**§ 1099. Handwriting—Modes of proving.**—There are many modes of proving the origin of disputed handwriting. These methods have been very conveniently classified as follows:<sup>13</sup> Proof of admission of the act; proof by witnesses who saw the pen form the letters; proof by witnesses who know the handwriting of the author from having seen him write; proof by witnesses who know the handwriting from correspondence with the author, on which he has acted; proof by witnesses who know the handwriting from familiarity with authentic documents; comparison by witnesses in court with genuine specimens of the handwriting of the same person; and comparison by the court or jury with the same genuine specimens. In some of these methods the proof may be made by the introduction into evidence of the opinions of ordinary witnesses or non-experts, while in others the opinions of experts alone are admissible.

**§ 1100. Handwriting—Opinions of non-experts.**—In at least one-fifth of the states of the Union the legislatures have enacted statutes in regard to the admission of opinions of non-expert witnesses as to handwriting. The most common provision is that the hand-

Gardner, 45 Ohio St. 309; Yost v. Conroy, 92 Ind. 464; Chicago, &c. R. Co. v. Springfield, &c. R. Co. 67 Ill. 142; Brunswick, &c. R. Co. v. McLaren 47 Ga. 546; Grand Rapids v. Grand Rapids, &c. R. Co. 58 Mich. 641; Alabama, &c. R. Co. v. Burkett, 42 Ala. 83. It is said in several cases that this is the better rule, but that a judgment should not be reversed merely because the witness has stated the damages instead of the value where the damages depend wholly on the value.

Union Elevator Co. v. Kansas City, &c. Co. 135 Mo. 353, 36 S. W. 1071; Roberts v. Railway Co. 128 N. Y. 455, 28 N. E. 486; Doyle v. Railway Co. 128 N. Y. 488, 28 N. E. 495. See Mills Em. Dom. § 165; Elliott Roads and Streets (2d ed.) § 258, and authorities there cited. A few courts have refused to go even this far. See 3 Elliott on Railroads, § 1038.

<sup>12</sup> Allen v. Field, 130 Fed. 641, 657, 658.

<sup>13</sup> 62 L. R. A. 817, note 1.



writing of a person may be proved by any one who believes it to be his, and has seen him write or has seen writings purporting to be his upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting. In most other jurisdictions this rule has been in substance established by judicial decision.<sup>14</sup> The reasonableness of the rule is clearly stated by a learned writer as follows: "The strongest evidence of the genuineness of handwriting is the testimony of the alleged writer himself, and next to this comes the testimony of a witness who saw the very instrument executed and is able to identify it. The competency of such evidence is never disputed. But it is obvious that there must be other and different modes of proof—modes which must of necessity be resorted to when the former are not attainable, and likewise whenever it is sought to contradict the testimony of the alleged writer or that of the actual witness. By nature and habit individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face. And just as the evidence of witnesses that they saw the prisoner near the scene of a murder at a certain time and under certain circumstances has been considered sufficient proof of his identity to hang him, in spite of his denial that he was the man, so the testimony of witnesses, 'we know the handwriting of John Smith, and this is his signature,' may overcome the oath of John Smith himself. 'This is not my writing; I swear I never signed such a paper in my life.' Nor is this kind of evidence 'secondary,' within the rule that the best evidence must be produced or its absence satisfactorily accounted for, before courts will listen to secondary evidence of the same matter. Whether writing is proved by the person who made it or by one acquainted with his hand, the kind of proof is exactly the same; they are both primary, since the knowledge of both is acquired by the same means. Therefore, the hand-

<sup>14</sup> See *Doe v. Suckermore*, 5 Adol. & El. 703; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. 921; *Com. v. Carey*, 2 Pick. (Mass.) 47; *Cunningham v. Bank*, 21 Wend. (N. Y.) 557; *Johnson v. Daverne*, 19 Johns. (N. Y.) 134; *Bullis v. Eaton*, 96 Iowa, 513, 65 N. W. 395; *Redding v. Redding's Est.* 69 Vt. 500, 38 Atl. 230; *Sill v. Reese*, 47

Cal. 294; *Riggs v. Powell*, 142 Ill. 453, 32 N. E. 482; *Campbell v. Iron Co.* 83 Ala. 351, 3 So. 369; *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; *Southern Ex. Co. v. Thornton*, 41 Miss. 216; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Ullman v. Babcock*, 63 Tex. 68; *Monumental, &c. Co. v. Doty*, 99 Mo. App. 195, 73 S. W. 234.

writing of a person may be proved in either of these modes, though he is himself within reach and might readily be produced, or is even actually in court at the time. This rule in civil and criminal cases is the same, and extends to all persons whether parties or not to the particular suit in which it is introduced."<sup>15</sup> One who has seen another person write may testify as to his handwriting even though he has not seen him write for a number of years,<sup>16</sup> or only on one occasion,<sup>17</sup> or only his name<sup>18</sup> or surname.<sup>19</sup> So, one who is familiar in other ways with a person's handwriting may testify as to it. This rule holds good when the knowledge of the handwriting was gained by correspondence<sup>20</sup> or in the course of business.<sup>21</sup> The general rule as to comparison of handwriting prohibits comparison by witnesses who are not qualified as experts, having from frequent comparisons, or the like, especial knowledge of handwritings generally. There seems to be no present authority for juxtaposition and comparison properly so called, by non-expert witnesses upon the direct examination, except in the states of Delaware and Michigan.<sup>22</sup>

§ 1101. **Handwriting—Opinions of experts.**—The expert unlike the non-expert may express an opinion as to handwriting without having had previous acquaintance or knowledge of the handwriting of an individual.<sup>23</sup> It is not essential that one should have made the

<sup>15</sup> Lawson Exp. and Opin. Ev. (2d ed.) p. 327.

<sup>16</sup> Commonwealth v. Nefus, 135 Mass. 533; Wilson v. Van Leer, 127 Pa. St. 371, 14 Am. St. 854.

<sup>17</sup> Rediout v. Newton, 17 N. H. 71; Hammond v. Varian, 54 N. Y. 398.

<sup>18</sup> Rediout v. Newton, 17 N. H. 71; Bowman v. Sanborn, 25 N. H. 87.

<sup>19</sup> Smith v. Walton, 8 Gill (Md.) 77. See, also, Garrells v. Alexander, 4 Esp. 37; Lewis v. Sapio, 1 M. & M. 39; In re Diggin's Est. 68 Vt. 198, 34 Atl. 696; Pepper v. Barnett, 22 Gratt. (Va.) 405; State v. Goodwin, 37 La. Ann. 713. But see People v. Corey, 148 N. Y. 476, 42 N. E. 1066; Nelms v. State, 91 Ala. 97, 9 So. 193. See, also, as to

mark of witness, George v. Surrey, 1 M. & M. 516; Carson's Appeal, 59 Pa. St. 493; Strong's Ex'rs v. Brewer, 17 Ala. 706.

<sup>20</sup> Pearson v. McDaniel, 62 Ga. 100.

<sup>21</sup> Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See, also, Redd v. State, 65 Ark. 475, 47 S. W. 119; Bullis v. Eaton, 96 Iowa, 513, 65 N. W. 395; Redding v. Redding's Estate, 69 Vt. 900, 38 Atl. 230; Violet v. Rose, 39 Neb. 660, 58 N. W. 216. But compare McKeone v. Barnes, 108 Mass. 344.

<sup>22</sup> 63 L. R. A. 163, note. See, also, Woodman v. Dana, 52 Me. 9, 15; Griffin v. State, 90 Ala. 596, 8 So. 670.

<sup>23</sup> Woodman v. Dana, 52 Me. 9.

comparison of handwriting a special study in order to be a competent witness, but it is generally essential that he should have been in the habit of frequently making such comparisons in connection with the business or profession in which he is engaged;<sup>24</sup> for an expert must have made the subject upon which he gives his opinion a matter of particular study, practice or observation, and he must have particular and special knowledge on the subject.<sup>25</sup> Among others, the following have been held competent as experts to give opinions as to handwriting: Lawyers,<sup>26</sup> teachers,<sup>27</sup> merchants,<sup>28</sup> bookkeepers,<sup>29</sup> conveyancers,<sup>30</sup> writing-masters,<sup>31</sup> photographers,<sup>32</sup> exchange brokers,<sup>33</sup> post-office clerks.<sup>34</sup> So, writing engravers<sup>35</sup> and officials in public offices<sup>36</sup> have been held competent as experts on handwriting. So, also, one is competent as an expert who has been treasurer and clerk of a railroad company, and was in the habit of examining signatures in such offices, and of examining bank bills to test their genuineness.<sup>37</sup>

**§ 1102. Handwriting—Illustrative cases where expert opinion allowed.**—Expert opinion as to handwriting has been admitted in a great variety of cases. Thus, it has been admitted on the questions as to whether the whole of an instrument was written by the same hand, with the same materials and at the same time;<sup>38</sup> whether a writing could be that of an aged person;<sup>39</sup> whether instruments were written by a natural or a feigned hand;<sup>40</sup> whether some words were transcribed over other words;<sup>41</sup> whether an instrument has been altered;<sup>42</sup> whether certain writings had been made before or after a paper had been folded.<sup>43</sup> And it has been held that the expert

<sup>24</sup> *Ort v. Fowler*, 31 Kans. 478.

<sup>25</sup> *Jones v. Tucker*, 41 N. H. 546.

<sup>26</sup> *State v. Phair*, 48 Vt. 366.

<sup>27</sup> *Bacon v. Williams*, 13 Gray (Mass.) 525.

<sup>28</sup> *Edmondston v. Henry*, 45 Mo. App. 346.

<sup>29</sup> *State v. De Graff*, 113 N. Car. 688.

<sup>30</sup> *Vinton v. Peck*, 14 Mich. 287.

<sup>31</sup> *Moody v. Rowell*, 17 Pick. (Mass.) 490.

<sup>32</sup> *Marcy v. Barnes*, 16 Gray (Mass.) 161.

<sup>33</sup> *Johnson v. State*, 35 Ala. 370.

<sup>34</sup> *Revett v. Braham*, 4 J. R. 497.

<sup>35</sup> *Reg. v. Williams*, 8 Car. & P. 434.

<sup>36</sup> *State v. Phair*, 48 Vt. 366.

<sup>37</sup> *Withee v. Rowe*, 45 Me. 571.

<sup>38</sup> *Reese v. Reese*, 90 Pa. St. 91, 35 Am. R. 634; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 89.

<sup>39</sup> *Lansing v. Russell*, 3 Barb. (N. Y.) Ch. 325.

<sup>40</sup> *Doe v. Suckermore*, 5 Adol. & Ell. 703.

<sup>41</sup> *Dubois v. Baker*, 30 N. Y. 355; *Reg. v. Williams*, 8 Car. & P. 434.

<sup>42</sup> *Vinton v. Peck*, 14 Mich. 287; *Nelson v. Johnson*, 18 Ind. 329.

<sup>43</sup> *Bacon v. Williams*, 13 Gray

may make use of the blackboard,<sup>44</sup> of plates and tables,<sup>45</sup> and of the microscope.<sup>46</sup>

**§ 1103. Comparison of handwriting—In general.**—By comparison of handwriting is now generally meant the actual juxtaposition in court, either by the jury (or a court in its place) or by witnesses, of a writing whose authorship is unknown, with another writing admitted or proved to have been written by a person alleged and denied to have written the first—with the object of determining the genuineness of the disputed writing, or, looking at the matter in a different way, the identity of its author.<sup>47</sup> It is truly stated in one case,<sup>48</sup> that there is, perhaps, no branch of the law which has given rise to such contrariety of adjudications in this country as that of comparisons of handwriting. It is further truly stated, in the same case, that it would be a laborious, if not a useless task to attempt to review or to reconcile the various decisions on this recondite offshoot of American jurisprudence.

**§ 1104. Comparison of handwriting—Under statutes.**—About half of the states of the Union have enacted statutes legalizing the comparison of handwriting by experts. Among these jurisdictions are: Arizona, California, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, and Wisconsin. The usual statutory provision is that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.<sup>49</sup>

**§ 1105. Comparison of handwriting—When no statute.**—In those jurisdictions where there are no statutes regulating the admission of

(Mass.) 525. But compare Sackett v. Spencer, 29 Barb. (N. Y.) 180. For other illustrative cases, see note in 66 Am. Dec. 240, 241.

<sup>44</sup> Dryer v. Brown, 52 Hun (N. Y.) 321; McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711.

<sup>46</sup> Green v. Terwilliger, 56 Fed. 384.

<sup>45</sup> Stevenson v. Gunning, 64 Vt. 601.

<sup>47</sup> 62 L. R. A. 817, note.

<sup>48</sup> Kirksey v. Kirksey, 41 Ala. 626. See articles in 30 Am. Law Rev. on the general subject; notes in 62 L. R. A. 817, 63 L. R. A. 163, 427, 937, 963.

<sup>49</sup> The jury may also make the comparison in many jurisdictions.

opinions as to a comparison of handwriting three distinct rules seem to prevail. In a few jurisdictions the rule is that the opinions of experts based on any comparison is improper;<sup>50</sup> in other jurisdictions the rule is that opinions are admissible in case the writings to be compared are in evidence for another purpose and admitted to be genuine;<sup>51</sup> and the third rule is that opinions of experts are admissible as in the rule immediately preceding and in addition, on writings, whose genuineness has been proved on the trial for the express purpose of comparison.<sup>52</sup> The reason given for holding that the only papers that can be used in such an examination of an expert are those which have been brought into the case for another purpose is that such a limitation is necessary in order to avoid the evil of collateral issues, the danger of fraud in selecting specimens, and the danger of misleading the jury.<sup>53</sup> But it is said, on the other hand, with much reason, that when the writings are admitted to be genuine these objections are of no force, that in either case, the result so depends upon skill and judgment in making the comparison and discovering the resemblances and differences that there

<sup>50</sup> See *State v. Ezekiel*, 33 S. Car. 115, 11 S. E. 635. See, also, *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179.

<sup>51</sup> *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617; *Moore v. United States*, 91 U. S. 270; *Moon v. Crowder*, 72 Ala. 79; *Kirksey v. Kirksey*, 41 Ala. 626; *Miller v. Jones*, 32 Ark. 337; *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105; *Tyler v. Todd*, 36 Conn. 218; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179; *Keyser v. Pickrell*, 4 App. D. C. 198; *Frank v. Taubman*, 31 Ill. App. 592; *Bowen v. Jones*, 13 Ind. App. 193, 41 N. E. 400; *Vinton v. Peck*, 14 Mich. 287; *Roy v. First Nat. Bank* (Miss.), 33 S. 494; *Staab v. Jaramillo*, 3 N. Mex. 1, 1 Pac. 170; *Tunstall v. Cobb*, 109 N. Car. 316, 14 S. E. 28.

<sup>52</sup> *Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575; *Nichols v. Baker*, 75 Me. 334; *Commonwealth v. East-*

*man*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Morrison v. Porter*, 35 Minn. 425, 59 Am. R. 331, 29 N. W. 54; *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142; *University of Illinois v. Spalding*, 71 N. H. 163; *Calkins v. State*, 14 Ohio St. 222; *Sperry v. Tebbs*, 20 Ohio L. J. 181; *Archer v. United States*, 9 Okla. 369, 60 Pac. 268; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Hanniot v. Sherwood*, 82 Va. 1. See *Gilmore v. Swisher*, 59 Kans. 172, 52 Pac. 426; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Dietz v. Fourth Nat. Bank*, 69 Mich. 287, 37 N. W. 220; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003.

<sup>53</sup> See reason fully stated and elaborated in *McDonald v. McDonald*, 142 Ind. 55, 69, 70, 41 N. E. 336, and *Doe v. Suckermore*, 5 A. & E. 710.

is little danger of misleading the jury, and that policy and necessity require that such a comparison should be permitted.<sup>54</sup>

**§ 1106. Handwriting—Miscellaneous.**—One is not as a general rule entitled to offer in evidence a specimen of his handwriting written during the trial, for comparison,<sup>55</sup> yet when done at the request of the opposite party it may be good evidence,<sup>56</sup> and this is often allowed at the request of the opposite party for the purpose of testing the expert on cross-examination.<sup>57</sup> It has been held in Georgia that neither the expert nor the counsel of the adverse party is entitled to know what writings will be used on the cross-examination, or whether they are genuine.<sup>58</sup> There is a test, known as the fac-simile test. It has been stated that no one writes even his own signature twice alike, so that if one writing is placed over another against the light and the two signatures perfectly coincide, one of them, at least, must be a forgery.<sup>59</sup> Some states have a statute which apply in case the writing is the subject of the crime to the effect that persons of skill may be called to testify touching the genuineness of a note, bill, draft or certificate of deposit or other instrument of writing, but that three witnesses at least shall be required to prove the fact of genuineness, except in the case of a

<sup>54</sup> See *Morrison v. Porter*, 35 Minn. 425, 20 N. W. 54; *Moore v. Palmer*, 18 Wash. 134, 44 Pac. 142, and *Doe v. Suckermore*, 5 A. & E. 710, for presentations of this view.

<sup>55</sup> *Commonwealth v. Allen*, 128 Mass. 46, 35 Am. R. 356; *King v. Donahue*, 110 Mass. 155, 14 Am. R. 589; *Hickon v. United States*, 303, 14 Sup. Ct. 334; *Williams v. State*, 61 Ala. 33; *McGlasson v. State*, 37 Tex. App. 630, 40 S. W. 505.

<sup>56</sup> *Huff v. Nims*, 11 Neb. 363, 9 N. W. 548.

<sup>57</sup> *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *Chandler v. Le Barron*, 45 Me. 534; *Doe v. Wilson*, 10 Moore P. C. 530; *Brooks v. Tichborne*, 5 Exch. 929; *Layers Trial*, 16 How St. Tr. 192. See, also, *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. 334, 335; *Sanderson v. Osgood*, 52 Vt. 309; *Smith v. King*,

62 Conn. 515, 26 Atl. 1059. But see *Williams v. Riches*, 77 Wis. 569, 46 N. W. 817. As to the use of other writings on cross-examination, see and compare *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 340; *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138; *First Nat. Bank v. Allen*, 100 Ala. 476, 489, 14 So. 335; *Bishop Atterbury's Trial*, 16 How. St. Tr. 571; *Hoag v. Wright*, 174 N. Y. 36, 63 L. R. A. 163, and note, where the whole subject of cross-examination of witnesses on handwriting is elaborately considered.

<sup>58</sup> *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751.

<sup>59</sup> See 4 Am. Law Rev. 625, 649.

larceny thereof. A rule which is often laid down is that knowledge of handwriting, acquired post litem motam for the purpose of testifying, will qualify only where it is clear that there was no motive, either in the writer or the witness, to manufacture testimony.<sup>60</sup> But it would seem that where witnesses are allowed to give opinions and to make comparisons, the motive or bias would ordinarily go to their credibility rather than their competency, and that this rule cannot be applied in all jurisdictions so broadly and extensively as the terms in which it is stated appear to indicate.

§ 1107. **Insurance.**—The opinions of persons skilled in matters of insurance have been received in many cases. Among the many illustrations of cases pertaining to such subject may be mentioned the following: as to whether changes made through the construction of additions<sup>61</sup> and other changes within or without the structure<sup>62</sup> increase the risk;<sup>63</sup> as to the meaning of technical terms according to the custom of the insurance world,<sup>64</sup> as to whether a vessel is a total loss,<sup>65</sup> as to the value and condition of a steamboat after a collision,<sup>66</sup> as to the usual rate of premium on certain property;<sup>67</sup> also as to the present value of an insurance policy,<sup>68</sup> and whether vessels in a certain condition are seaworthy.<sup>69</sup> Opinions of insurance men "that matters outside the contract would have influenced them, had they been aware of them," are said to be "irrelevant."<sup>70</sup> So

<sup>60</sup> *Lawson Exp. and Opin. Ev.* (2d ed.) 362; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. R. 538; *Reese v. Reese*, 90 Pa. St. 91; *Sarderson v. Osgood*, 52 Vt. 309; *Whitmore v. Corey*, 16 N. J. L. 267; *McGlasson v. State*, 37 Tex. App. 630, 40 S. W. 505.

<sup>61</sup> *Kern v. St. Louis Ins. Co.* 40 Mo. 19.

<sup>62</sup> *Daniels v. Hudson River Ins. Co.* 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Schenck v. Mercer County Ins. Co.* 24 N. J. L. 447.

<sup>63</sup> But see *infra*, note 71.

<sup>64</sup> *Niagara Ins. Co. v. Greene*, 77 Ind. 590; *Johnson v. Northwestern Ins. Co.* 39 Wis. 87; *Fry v. Life Ass. Soc.* (Tenn. Ch. App.), 38 S. W. 116; *Mead v. Northwestern Ins. Co.* 7 N. Y. 530.

<sup>65</sup> *McLain v. Insurance Co.* 38 N. Y. S. 77.

<sup>66</sup> *The Clipper v. Logan*, 18 Ohio, 375, 395.

<sup>67</sup> *Devereux v. Ins. Co.* 4 N. Y. S. 655.

<sup>68</sup> *Price v. Conn. Life Ins. Co.* 48 Mo. App. 281.

<sup>69</sup> *Walsh v. Washington Ins. Co.* 32 N. Y. 427.

<sup>70</sup> *Lawson Exp. and Opin. Ev.* (2d ed.) p. 49. See, also, *Insurance Co. v. Eshelman*, 30 Ohio St. 647; *Washington Life Ins. Co. v. Haney*, 10 Kans. 525; *Rawls v. American Mutual Ins. Co.* 27 N. Y. 282; *Higbie v. Guardian, &c. Ins. Co.* 53 N. Y. 603; *Summers v. United States Ins. Co.* 13 La. Ann. 504.

the question as to certain things increasing the risk are generally questions of fact for the jury and not for the opinions of experts.<sup>71</sup> There is a diversity of opinion, however, in the different jurisdictions as to the admissibility of such evidence as to whether a risk at any premium would have been taken on the life of one having a certain occupation.<sup>72</sup> But it has been held that an employé of the supreme secretary of a beneficiary association cannot give an opinion, based upon his duties and his contact with the records, as to whether a certain person was a member of the association.<sup>73</sup>

§ 1108. **Railways and their management.**—There are some matters connected with or relating to railroads that are well known by all men of ordinary understanding and experience and of which it has even been held that the court will take judicial notice in a general way. As to such matters, it would seem that expert opinion is inadmissible. But as to many other matters relating to railroads and their management the opinions of railroad men are admissible. These matters are numerous, and only a few of the many illustrative cases can be given here. It has been held that qualified railroad men may testify as to the proper manner of laying rails,<sup>74</sup> as to sparks coming from an engine,<sup>75</sup> as to why a train under a given state of facts jumped the track,<sup>76</sup> as to the duty of those managing a train under a given state of facts,<sup>77</sup> as to safe appliances for cars and tracks,<sup>78</sup> as to the danger of backing a train of cars,<sup>79</sup> and as to the proper appliances for engines.<sup>80</sup> It has also

<sup>71</sup> *Rawls v. Ins. Co.* 27 N. Y. 283, 293; *Milwaukee R. Co. v. Kellogg*, 94 U. S. 469, 472; *Franklin Ins. Co. v. Gruver*, 100 Pa. St. 266; *First Congregational Society v. Insurance Co.* 158 Mass. 475, 33 N. E. 573; *State v. Watson*, 65 Me. 74; *Insurance Co. v. Harmer*, 2 Ohio St. 452; *Insurance Co. v. Insurance Co.* 1 Handy (Ohio) 408.

<sup>72</sup> The following hold such admissible: *Hartman v. Keystone Insurance Co.* 21 Pa. St. 466. The following hold such not competent: *Thayer v. Providence Insurance Co.* 70 Me. 531; *Mulry v. Mohawk Valley Insurance Co.* 5 Gray (Mass.) 541, 545, 66 Am. Dec. 380.

<sup>73</sup> *Wagner v. Supreme Lodge*, 128 Mich. 660, 87 N. W. 903.

<sup>74</sup> *Grand Rapids R. Co. v. Huntley*, 38 Mich. 537.

<sup>75</sup> *Davidson v. St. Paul, &c. R. Co.* 34 Minn. 51.

<sup>76</sup> *Murphy v. N. Y. Central R. Co.* 66 Barb. (N. Y.) 125.

<sup>77</sup> *Czezewzka v. Benton, &c. R. Co.* 121 Mo. 201.

<sup>78</sup> *Baldwin v. Chicago, &c. R. Co.* 50 Iowa, 680.

<sup>79</sup> *Kuhns v. Wisconsin R. Co.* 70 Iowa, 561.

<sup>80</sup> *Chicago, &c. R. Co. v. Shannon*, 43 Ill. 338.



been held that railroad men may also give in evidence their opinions as to the value of the hammer test for detecting defective car wheels,<sup>81</sup> as to effect of a car running over an improperly set switch,<sup>82</sup> as to whose business it is to "make up" trains,<sup>83</sup> that a brakeman on top of a train of cars should be on the footboard in the center,<sup>84</sup> that a certain place was a dangerous place to stop,<sup>85</sup> as to whether a track-walker was necessary,<sup>86</sup> as to appliances for raising cars,<sup>87</sup> and as to whether one brakeman was sufficient to control the speed of a train.<sup>88</sup> They may also give their opinions as to the advantage of manufacturing cars with double deadwoods,<sup>89</sup> as to the necessity for cars in a certain place to move only by the flagman giving signals,<sup>90</sup> as to the distance sparks could be carried from an engine,<sup>91</sup> as to estimating speed of a train by the sound,<sup>92</sup> as to the quality of cross-ties,<sup>93</sup> and as to the defects in a car-coupling,<sup>94</sup> and most men employed in the railroad business may give their opinions as to the distance within which certain trains may be checked.<sup>95</sup> A station agent may testify as to the disadvantage to the shipper in having a track enclosed.<sup>96</sup> Street-car drivers may testify as to their proper stations.<sup>97</sup> So such evidence has been held admissible as to the proper method of loading and unloading timber on cars,<sup>98</sup> and as to the speed of trains.<sup>99</sup> A conductor for many years accustomed to the motion of cars is competent, although he has never had any experience on an engine, to testify as to how far the

<sup>81</sup> Pittsburgh R. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61.

<sup>82</sup> Louisville, &c. R. Co. v. Moth-  
ershed, 97 Ala. 261, 12 S. 714.

<sup>83</sup> Price v. Richmond, &c. R. Co.  
33 S. Car. 556, 12 S. E. 413.

<sup>84</sup> Schlaff v. Railroad Co. 100 Ala.  
377, 14 So. 105.

<sup>85</sup> Alabama Mineral R. Co. v.  
Jones, 114 Ala. 519, 21 So. 507.

<sup>86</sup> Galveston, &c. R. Co. v. Bo-  
han (Tex. Civ. App.), 47 S. W. 1050.

<sup>87</sup> Austin Co. v. Groethe (Tex.  
Civ. App.), 31 S. W. 197.

<sup>88</sup> Union Pac. R. Co. v. Novak, 61  
Fed. 573.

<sup>89</sup> Baldwin v. Chicago, &c. R. Co.  
50 Iowa, 680.

<sup>90</sup> Jackson v. Grand Ave. R. Co.  
18 Mo. 199.

<sup>91</sup> Davidson v. St. Paul, &c. R.  
Co. 34 Minn. 51.

<sup>92</sup> Missouri Pac. R. Co. v. Hilde-  
brand, 52 Kans. 284.

<sup>93</sup> Jeffersonville R. Co. v. Lanham,  
27 Ind. 171.

<sup>94</sup> Baltimore, &c. R. Co. v. Elliott,  
9 App. Cas. (D. C.) 341.

<sup>95</sup> Freeman v. Travelers' Ins. Co.  
144 Mass. 572.

<sup>96</sup> Robinson v. St. Louis, &c. R.  
Co. 21 Mo. App. 141.

<sup>97</sup> Czezewzka v. Benton, &c. R. Co.  
121 Mo. 201.

<sup>98</sup> McCray v. Galveston, &c. R. Co.  
89 Tex. 168; Cleveland, &c. R. Co.  
v. Hall, 70 Ill. App. 429.

<sup>99</sup> Francisco v. Troy, &c. R. Co.  
78 Hun (N. Y.) 13.

manner in which the engineer manages his engine affects the lurch or motion of the train,<sup>100</sup> and an engineer of experience may testify that no engine in proper condition will throw sparks of a certain size.<sup>101</sup>

Other illustrative cases are reviewed elsewhere,<sup>102</sup> and some of them, as well as some of those referred to in this section, seem to trench upon the rule that opinion evidence is not admissible upon the precise issue to be determined by the jury. A few others seem to permit opinion evidence on matters that might, perhaps, have been determined by the jury as men of ordinary understanding from the facts without the aid of such opinions. It is impossible to reconcile all the cases; but it will be found, on examination, that in most of them there was no intention to violate these rules, although a few courts are inclined to deny or give little heed to the rule that opinion evidence should not be received upon the ultimate fact or issue to be determined by the jury.

**§ 1109. Value—In General.**—Although ordinary witnesses may give their opinions as to value,<sup>103</sup> it is universally held that experts may be called, in a proper case, for the same purpose. And when experts are so called it is not a necessary qualification to their competency that their knowledge should have come from observation of the particular article or real estate.<sup>104</sup> "It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess, and the determination of this matter rests largely in the discretion of the trial judge."<sup>105</sup> But if the witness has no actual knowledge on the subject, and is no better qualified to judge than the jury, his opinion would be worse than useless, and the court may well decline to receive it.<sup>106</sup>

**§ 1110. Value—Of personal property.**—Those having peculiar

<sup>100</sup> *Smith v. Canadian Pac. R. Co.*  
34 Nov. Sc.' 22.

<sup>101</sup> *Louisville, &c. R. Co. v. Marbury Lumber Co.* 132 Ala. 520, 32 So. 745. See, also, *Texas, &c. R. Co. v. Watson*, 190 U. S. 288, 23 Sup. Ct. 681.

<sup>102</sup> Ante § 1073.

<sup>103</sup> See article 22 Am. Law. Reg.  
325.

<sup>104</sup> *Mish v. Wood*, 34 Pa. St. 451.

<sup>105</sup> *Montana R. Co. v. Warren*,  
137 U. S. 348, 11 Sup. Ct. 96, 97.  
The opinion in this case contains some interesting observations on the necessity of often resorting to opinion evidence as to value of real estate, even when it is more or less speculative.

<sup>106</sup> *Teerpenning v. Corn Exchange Ins. Co.* 43 N. Y. (4 Hand) 279.

knowledge as to the value of personal property may give in evidence, in a proper case, their opinion as to its value.<sup>107</sup> Thus opinions have been received by competent experts as to the value of material for clothing,<sup>108</sup> furniture,<sup>109</sup> jewelry,<sup>110</sup> crops,<sup>111</sup> and animals,<sup>112</sup> such as horses,<sup>113</sup> cattle,<sup>114</sup> swine,<sup>115</sup> poultry<sup>116</sup> and mules.<sup>117</sup> So also expert opinion has been received as to the value of annuities,<sup>118</sup> foreign money,<sup>119</sup> railroad bonds,<sup>120</sup> municipal bonds,<sup>121</sup> mining claims,<sup>122</sup> stock of corporation<sup>123</sup> and patents.<sup>124</sup> And among other miscellaneous matters may be mentioned bottles,<sup>125</sup> saloon fixtures,<sup>126</sup> guns,<sup>127</sup> leaseholds,<sup>128</sup> machinery,<sup>129</sup> paintings,<sup>130</sup> pianos,<sup>131</sup> sailing crafts,<sup>132</sup> ice,<sup>133</sup> locomotives,<sup>134</sup> lumber,<sup>135</sup> and poles and ties.<sup>136</sup>

<sup>107</sup> *Moore v. Kenockee*, 75 Mich. 332, 42 N. W. 944; *Thompson v. Boyle*, 85 Pa. St. 477; *Brown v. Huffard*, 69 Mo. 305; *Smith v. Wilcox*, 4 Hun (N. Y.) 411.

<sup>108</sup> *Browning v. Long Island R. Co.* 2 Daly (N. Y.) 117.

<sup>109</sup> *Willison v. Smith*, 60 Mo. App. 469; *Rademacher v. Greenwich Ins. Co.* 75 Hun (N. Y.) 83.

<sup>110</sup> *Central, &c. R. Co. v. Wolff*, 74 Ga. 664.

<sup>111</sup> *Atchison, &c. R. Co. v. Stanford*, 12 Kans. 354, 15 Am. R. 362.

<sup>112</sup> *Fry v. Estes*, 52 Mo. App. 1; *Smith v. Wilcox*, 4 Hun (N. Y.) 411; *Plunkett v. Minneapolis, &c. R. Co.* 79 Wis. 222.

<sup>113</sup> *Browne v. Moore*, 32 Mich. 254; *Cleveland, &c. R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804; *Leek v. Chesley*, 98 Iowa, 593, 67 N. W. 580.

<sup>114</sup> Cases cited in note 112.

<sup>115</sup> *Lachner v. Adams Express Co.* 12 Mo. App. 13.

<sup>116</sup> *Texas Central R. Co. v. Fisher* (Tex. Civ. App.), 74 S. W. 329. compare *Texas, &c. R. Co. v. Meek* (Tex. Civ. App.), 74 S. W. 329.

<sup>117</sup> *Haight v. Kimbark*, 57 Iowa, 13.

<sup>118</sup> *Heathcote v. Paignon* (English) 2 Bro. C. C. 167.

<sup>119</sup> *Kermott v. Ayer*, 11 Mich. 181.

<sup>120</sup> *Smith v. Frost*, 42 N. Y. Super. Ct. 87.

<sup>121</sup> *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499.

<sup>122</sup> *Montana, &c. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96.

<sup>123</sup> *Noonan v. Ilsley*, 22 Wis. 27.

<sup>124</sup> *Burton v. Burton Stock Car Co.* 171 Mass. 437, 50 N. E. 1029.

<sup>125</sup> *Vandercook v. O'Connor*, 172 Mass. 301, 52 N. E. 444.

<sup>126</sup> *Connelly v. Edgerton*, 22 Neb. 82.

<sup>127</sup> *Cooper v. State*, 53 Miss. 393.

<sup>128</sup> *Botler v. Philadelphia, &c. Co.* 164 Pa. St. 397, 30 Atl. 303.

<sup>129</sup> *Fox v. Cox*, 20 Ind. App. 61; *Orr v. New York*, 64 Barb. (N. Y.) 106.

<sup>130</sup> *Houston, &c. Co. v. Burke*, 55 Tex. 323, 40 Am. R. 808.

<sup>131</sup> *Fredericks v. Sault*, 19 Ind. App. 604.

<sup>132</sup> *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56, 14 N. E. 802.

<sup>133</sup> *Washington Ice Co. v. Webster*, 68 Me. 449.

<sup>134</sup> *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 548.

<sup>135</sup> *Lawton v. Chase*, 108 Mass. 238; *Gregory v. McDowell*, 8 Wend. (N. Y.) 435.

<sup>136</sup> *Beaudry v. Duquette* (Minn.), 99 N. W. 635.

§ 1111. **Value—Of real estate.**—Persons familiar with the real estate in question or real estate of a similar character and similarly located may give their opinions as to the value of certain real estate.<sup>137</sup> It is not essential that they know of actual purchases or sales in the vicinity.<sup>138</sup> Thus opinions have been received as to various kinds of real property, as farm lands,<sup>139</sup> houses,<sup>140</sup> orchards,<sup>141</sup> wharfage,<sup>142</sup> mineral lands<sup>143</sup> and city lots.<sup>144</sup> So real estate agents, assessors or other officials, or ordinary witnesses with special knowledge may testify as to the value of lands.<sup>145</sup> But mere observation of certain real estate has been held insufficient to qualify an ordinary witness to testify as an expert concerning its value.<sup>146</sup>

§ 1112. **Value—Of services.**—Persons of a certain occupation or profession may give expert opinions as to the value of services performed by those of their own vocation. Thus mechanics,<sup>147</sup> physicians,<sup>148</sup> clerks,<sup>149</sup> lawyers,<sup>150</sup> artists<sup>151</sup> and nurses<sup>152</sup> have been al-

<sup>137</sup> *Laing v. United N. J. R. & Co.* 54 N. J. L. 576, 33 Am. St. 682; *Robertson v. Knapp*, 35 N. Y. 91; *Morrison v. Watson*, 101 N. Car. 332; *Miller v. Windsor Water Co.* 148 Pa. St. 429; *Whitney v. Boston*, 98 Mass. 312; *Huff v. Hall*, 56 Mich. 456; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. 359. Such witnesses do not, however, always testify as experts in the fullest sense, but as those having knowledge of the value. *Johnson v. Freeport, &c. R. Co.* 111 Ill. 413; *Frankfort, &c. R. Co. v. Windsor*, 51 Ind. 238; *Jacksonville, &c. R. Co. v. Walsh*, 106 Ill. 253.

<sup>138</sup> *Mantz v. Maguire*, 52 Mo. App. 136; *Montana R. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96; *Hanover Water Co. v. Ashland Iron Co.* 84 Pa. St. 279. See, also, *Board of Levee Comrs. v. Nelms* (Miss.), 34 So. 149. But compare *Friday v. Penna. R. Co.* 204 Pa. St. 405, 54 Atl. 339.

<sup>139</sup> *Snyder v. Western Union R. Co.* 25 Wis. 60; *Thomas v. Mallinckrodt*, 43 Mo. 58; *Stone v. Covell*,

29 Mich. 359; *Robertson v. Knapp*, 35 N. Y. 91.

<sup>140</sup> *Phoenix Insurance Co. v. Cope-land*, 89 Ala. 551; *Hough v. Cook*, 69 Ill. 581.

<sup>141</sup> *Latham v. Brown*, 48 Kans. 190.

<sup>142</sup> *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. 388.

<sup>143</sup> *Hanover Water Co. v. Ashland Iron Co.* 84 Pa. St. 279.

<sup>144</sup> *Teele v. Boston*, 165 Mass. 88; *Schuylkill River, &c. v. Stocker*, 128 Pa. St. 233.

<sup>145</sup> *Bristol Bank v. Keavy*, 128 Mass. 298; *Hanlenbeck v. Cronkright*, 23 N. J. Eq. 407.

<sup>146</sup> *Riley v. Camden, &c. R. Co.* (N. J.), 57 Atl. 445.

<sup>147</sup> *Shepard v. Ashley*, 10 Allen (Mass.) 542.

<sup>148</sup> *Wood v. Barker*, 49 Mich. 295.

<sup>149</sup> *Enos v. St. Paul Ins. Co.* 4 S. Dak. 639.

<sup>150</sup> *Kelley v. Richardson*, 69 Mich. 430; *Wilson v. Union Distilling Co.* 3 Colo. App. 540, 66 Pac. 170.

<sup>151</sup> *Babcock v. Raymond*, 2 Hilt. (N. Y.) 61.

<sup>152</sup> *Wallace v. Schaub*, 81 Md. 594,

lowed to give their opinions as to the value of services. So also the opinions of authors,<sup>153</sup> farmers,<sup>154</sup> carpenters,<sup>155</sup> housekeepers,<sup>156</sup> book-keepers<sup>157</sup> and brokers<sup>158</sup> have been received in evidence as to the value of their respective services. But in an action of trover for wood, it was held that the question as to what was a fair price for hauling the wood did not call for an expert opinion.<sup>159</sup>

§ 1113. **Miscellaneous instances of opinions held admissible.**—The distance at which powder stains are caused by firearms, and the probable effects of gas generated by the explosion of the powder, as dependent upon the proximity of one claiming to have been accidentally injured by the discharge of a gun, have been held proper subjects of expert testimony.<sup>160</sup> So, it has been held that an expert may be asked, in an action for damages caused by leaking gas, as to what extent it is practicable to construct a gas plant so as to avoid leakage in its pipes, but he cannot be asked in chief for the opinion of others upon the subject.<sup>161</sup> Questions in regard to spark arresters, whether a spark arrester in proper condition will permit sparks of a certain size to be thrown, how far sparks are thrown, and the like, have also been held proper matter for expert testimony.<sup>162</sup> In an action for the price of a machine of complex construction opinions of experts have been held admissible on the question as to whether the machine would do the work required;<sup>163</sup> and, in negligence cases and the like, various matters relating to machinery, its construction, use and management, have been held proper subjects

32 Atl. 324; *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 285.

<sup>153</sup> *Babcock v. Raymond*, 2 Hilt. (N. Y.) 61.

<sup>154</sup> *Bowen v. Bowen*, 74 Ind. 470.

<sup>155</sup> *Tebbetts v. Haskins*, 16 Me. 283.

<sup>156</sup> *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583.

<sup>157</sup> *Shattuck v. Train*, 116 Mass. 296.

<sup>158</sup> *Carruthers v. Towne*, 86 Iowa, 318, 53 N. W. 240. See, also, generally, *Boyd v. Vale*, 82 N. Y. S. 932.

<sup>159</sup> *Harris v. Smith*, 71 N. H. 330, 52 Atl. 854.

<sup>160</sup> *Long v. Travelers' Ins. Co.* 113 Ia. 259, 85 N. W. 24.

<sup>161</sup> *Indiana Nat. &c. Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

<sup>162</sup> *Peck v. New York, &c. R. Co.* 165 N. Y. 347, 59 N. E. 206; *Jamieson v. New York, &c. R. Co.* 42 N. Y. S. 915, 11 App. Div. 50, affirmed in 163 N. Y. 630; *Louisville, &c. R. Co. v. Marbury Lumber Co.* 132 Ala. 520, 32 So. 745; *Texas, &c. R. Co. v. Watson*, 190 U. S. 288, 23 Sup. Ct. 681.

<sup>163</sup> *Buckeye Mfg. Co. v. Woolley, &c. Works*, 26 Ind. App. 7, 58 N. E. 1069.

for expert testimony.<sup>164</sup> So, the subject of cause and effect is frequently one upon which expert testimony is admissible.<sup>165</sup> Such evidence is also admissible, in a proper case, as to the meaning of technical trade terms and the like.<sup>166</sup> Other illustrative cases of a miscellaneous nature are cited below.<sup>167</sup>

— § 1114. **Miscellaneous instances of opinions held inadmissible.**— It has been held, on the other hand, that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable passengers to get off safely;<sup>168</sup> whether it was prudent to blow a whistle at a particular time;<sup>169</sup> nor whether unoccupied buildings are not peculiarly liable to fire.<sup>170</sup> So, it has been held that opinions of experts are inadmissible as to how long it takes to assess a township for taxation and how much work could be done in a day;<sup>171</sup> as to the tendency of the operation of a railroad to injure property;<sup>172</sup> that a road is necessary;<sup>173</sup> as to whether the fact that a car ran a certain distance before coming to a stop would indicate

<sup>164</sup> *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Thiel v. Kennedy*, 82 Minn. 142, 84 N. W. 657; *Akin v. St. Croix Lumber Co.* 88 Minn. 119, 92 N. W. 537; *Texas, &c. R. Co. v. Cockrane* (Tex. Civ. App.) 69 S. W. 984; *Palmquist v. Mine, &c. Co.* 25 Utah, 257, 70 Pac. 994; *Fritz v. Western Union Tel. Co.* 25 Utah, 263, 71 Pac. 209; *N. & M. Friedman Co. v. Atlas Assur. Co.* (Mich.), 94 N. W. 757; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669.

<sup>165</sup> *N. M. Friedman Co. v. Atlas Assur Co.* (Mich.), 94 N. W. 757; *Sachra v. Town of Manilla*, 120 Iowa, 562, 95 N. W. 198; *Douk Bros. Coal, &c. Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29.

<sup>166</sup> *Heyworth v. Miller, &c. Co.* 174 Mo. 171, 73 S. W. 498; *Republic of Colombia v. Cauca Co.* 113 Fed. 1020; *Wilson v. Needermann*, 10 Ohio Dec. R. 226; *Miller v. Stevens*, 100 Mass. 518; *Dana v. Fiedler*, 12 N. Y. 40; *Burlington Ins. Co. v. McLeod*, 40 Kans. 54; ante vol. I, §§ 605, 608.

<sup>167</sup> *Johnson v. Detroit, &c. R. Co.* (Mich.), 97 N. W. 760; *Skinner v. E. F. Kerwin & Co.* 103 Mo. App. 650, 77 S. W. 1011; *Fruit Dispatch Co. v. Murray*, 90 Minn. 286, 96 N. W. 83; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770; *Chicago, &c. R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640; *Louisville, &c. R. Co. v. Scott*, 22 Ky. L. R. 30, 56 S. W. 674, 50 L. R. A. 381; *Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57; *Sanders v. O'Callaghan*, 111 Iowa, 574, 82 N. W. 969.

<sup>168</sup> *Keller v. Railroad Co.* 2 Abb. Dec. (N. Y.) 480.

<sup>169</sup> *Hill v. Railroad Co.* 55 Me. 438, 92 Am. Dec. 601.

<sup>170</sup> *Mulry v. Insurance Co.* 5 Gray (Mass.) 541, 60 Am. Dec. 380.

<sup>171</sup> *Board of Com'rs of Clay Co. v. Redifer* (Ind. App.), 69 N. E. 305.

<sup>172</sup> *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42, 15 Atl. 833.

<sup>173</sup> *Burwell v. Speed*, 104 N. Car. 118, 10 S. E. 152.

that it had been running faster than ten or twelve miles an hour, or that the motorman did not apply the brakes or reverse power properly;<sup>174</sup> and as to various other matters said to be within the comprehension of ordinary men and not to be questions involving scientific or special knowledge or skill,<sup>175</sup> or to be directly in issue and for the jury to decide as an ultimate fact.<sup>176</sup>

<sup>174</sup> *Koeing v. Union Depot R. Co.* 173 Mo. 698, 73 S. W. 637.

<sup>175</sup> *Illinois Steel Co. v. Mann*, 197 Ill. 186, 64 N. E. 328; *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245; *Missouri, &c. Tel. Co. v. Vandervort*, 67 Kans. 269, 72 Pac. 771; *Kerrigan v. Market St. R. Co.* 138 Cal. 506, 71 Pac. 621; *Groton Bridge, &c. Co. v. Alabama, &c. R. Co.* 80 Miss. 162, 31 So. 739; *W. J. Lemp Brewing Co. v. Ort*, 113 Fed. 482; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *Boothby v. Lacasse*, 94 Me. 392, 47 Atl. 916; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

<sup>176</sup> *Chicago, &c. R. Co. v. Holmes*

(Neb.), 94 N. W. 1007; *McGibbons v. McGibbons*, 119 Ia. 140, 93 N. W. 55; *Zimmerman v. Conrad* (Mo. App.), 74 S. W. 139; *Sullivan v. City of Rome*, 83 N. Y. S. 554; *Bookman v. Masterson*, 81 N. Y. S. 962; *People v. Lehr*, 196 Ill. 361, 63 N. E. 725; *Bradford Glycerine Co. v. Kizer*, 113 Fed. 894; *Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302. For other cases in which expert testimony was held inadmissible, see *Hamilton v. Michigan Cent. R. Co.* (Mich.), 97 N. W. 392; *Goodsell v. Taylor*, 41 Minn. 207; *Arnold v. Eastman, &c. Co.* 176 Mass. 135, 57 N. E. 209; *Green v. State*, 154 Ind. 655, 57 N. E. 637.

## CHAPTER LIII.

### EXAMINATION OF EXPERTS.

Sec.	Sec.
1115. Preliminary examination as to competency.	1123. Questions as to particular cases.
1116. Basis of opinion.	1124. Cross-examination—Latitude allowed.
1117. Form of question.	1125. Cross-examination — Testing knowledge and weight of testimony.
1118. Opinion based on hearsay—Statements of patient.	1126. Re-examination.
1119. Right to base question on facts according to theory of party.	1127. Use of books of science and art.
1120. Must be evidence to support assumed facts.	1128. Limiting number of expert witnesses—Exclusion from court room—Compensation.
1121. Evidence tending to prove assumed facts is sufficient.	
1122. Assumption of facts not proved—Promise to prove—Motion to strike out.	

§ 1115. Preliminary examination as to competency.—It is apparent from what has been said in preceding chapters that the manner and extent of the examination as to the qualification of witnesses introduced as experts is a matter largely within the discretion of the trial court. It is customary, however, for the party who introduces the witness to ask such preliminary questions as will call forth evidence satisfying the court that the witness is competent to speak as an expert,<sup>1</sup> and then the other party can go more fully into the

<sup>1</sup> Jones v. Tucker, 41 N. H. 546. &c. R. Co. 78 Ga. 749, 3 S. E. 621.  
But see where the witness is acquainted with the particular facts of the case. Killian v. Augusta, If the witness is shown on cross-examination to be qualified, error in admitting evidence-in-chief



question of his competency and matters affecting the weight of the testimony of the witness as an expert on the regular cross-examination. If the evidence on the preliminary examination makes a *prima facie* case of competency and satisfies the court of the qualifications of the witness, the court is not bound to permit a preliminary cross-examination on that question;<sup>2</sup> but the court has a right to permit a preliminary cross-examination on the question of competency, and it is proper and customary to allow such a preliminary cross-examination, especially where there is doubt as to the competency of the witness.<sup>3</sup>

§ 1116. **Basis of opinion.**—An expert witness may give an opinion, in a proper case, based upon his own knowledge of facts disclosed in his testimony,<sup>4</sup> or he may give an opinion upon facts shown in evidence and assumed in a hypothetical question submitted to him.<sup>5</sup> But he cannot give an opinion based upon facts which may be known

without first showing him to be an expert may be cured. *Crich v. Williamsburg, &c. Ins. Co.* 45 Minn. 441, 48 N. W. 198. But a witness cannot be shown to be an expert by his own opinion that he is qualified as such. *Boardman v. Woodman*, 47 N. H. 120. Nor is evidence of other witnesses as to such qualifications ordinarily admissible after the evidence of the alleged expert has been received. *Tullis v. Kidd*, 12 Ala. 648; *De Phul v. State*, 44 Ala. 32; *Brabo v. Martin*, 3 La. 177. But see *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 837. Evidence of other witnesses may, however, be received on the preliminary question of qualification. *Mendum v. Commonwealth*, 6 Rand (Va.) 704; *Tullis v. Kidd*, 12 Ala. 648; *Laros v. Commonwealth*, 84 Pa. St. 200.

<sup>2</sup> *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 437; *Sarle v. Arnold*, 7 R. I. 582. See, also, *Brunner v. Cook, &c. Co.* 85 N. Y. S. 954; *Stroh v. South Covington, &c. St. R. Co. (Ky.)*, 78 S. W. 656;

*Finch v. Chicago, &c. R. Co.* 46 Minn. 250, 48 N. W. 915.

<sup>3</sup> *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 437.

<sup>4</sup> *Louisville, &c. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562; *Oliver v. Columbia, &c. R. Co.* 65 S. Car. 1, 43 S. E. 307; *Skelton v. St. Paul, &c. R. Co.* 88 Minn. 192, 92 N. W. 960; *Kaminski v. Tudor Iron Works*, 167 Mo. 462, 67 S. W. 221; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804 (opinion based on X-Ray examination). *Selleck v. City of Janesville*, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563; *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409; *Bellefontaine, &c. R. Co. v. Bailey*, 11 Ohio St. 333; *Transportation Line v. Hope*, 95 U. S. 287.

<sup>5</sup> *Burns v. Barenfield*, 84 Ind. 43; *Kempsey v. McGinnis*, 21 Mich. 123; note in 2 L. R. A. 668, and numerous authorities hereinafter cited. In *McKay v. Lasher*, 121 N. Y. 477, an expert in hand-writing was permitted to illustrate and explain his testimony on a black-board.

to him but which are in no way disclosed by the evidence,<sup>6</sup> nor upon the very case to be decided by the jury,<sup>7</sup> at least when to do so he would have to draw his conclusion from all the testimony and pass upon the credibility of witnesses.<sup>8</sup> As said by the Supreme Court of Massachusetts: "The object of all questions to experts should be to obtain their opinion as to matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts."<sup>9</sup> It is also held in Wisconsin that an expert medical witness should not be permitted to state what he has learned entirely from medical works without any practical experience of his own.<sup>10</sup>

**§ 1117. Form of question.**—When the opinion of an expert is

<sup>6</sup> *Raub v. Carpenter*, 187 U. S. 159, 23 Sup. Ct. 72; *Green v. Ashland Water Co.* 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 122; *Burns v. Barenfield*, 84 Ind. 43; *Kempsey v. McGinnis*, 21 Mich. 123; *Van Deusen v. Newcomer*, 40 Mich. 120; *Reid v. Piedmont, &c. Ins. Co.* 58 Mo. 425; *Haggerty v. Brooklyn, &c. R. Co.* 61 N. Y. 624. But see *Donnelly v. St. Paul, &c. R. Co.* 70 Minn. 278, 73 N. W. 157.

<sup>7</sup> *Muldowney v. Illinois Cent. R. Co.* 39 Iowa 615; *Smith v. Hickenbottom*, 57 Iowa 733; *Chicago, &c. R. Co. v. Springfield, &c. R. Co.* 67 Ill. 142; *State v. Cole*, 94 N. Car. 958; *Hill v. Portland, &c. R. Co.* 55 Me. 444; *Boor v. Lourey*, 103 Ind. 480; *Clark v. Detroit, &c. Works*, 32 Mich. 348; *Baltimore, &c. Turnp. Co. v. Cassell*, 66 Md. 419; *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 72 N. W. 1124, 1127; *Jameson v. Drinkald*, 12 Moore, 148; *Farrell v. Brennan*, 32 Mo. 328; *State v. Brown*, 93 Mo. 469, 79 S. W. 1111.

<sup>8</sup> *McMechen v. McMechen*, 17 W. Va. 683, 694; *Stoddard v. Inhabitants of Winchester*, 157 Mass. 575, 32 N. E. 948; *Buxton v. Somerset Potter Works*, 124 Mass. 446; *Gui-*

*terman v. Liverpool, &c. Co.* 83 N. Y. 358; *Rush v. Magee*, 36 Ind. 691; *Dexter v. Hall*, 15 Walh. (U. S.) 9; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668, and note; *Burns v. Barenfield*, 84 Ind. 43; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Inland Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653.

<sup>9</sup> *Hunt v. Lowell Gas Light Co.* 8 Allen (Mass.) 169.

<sup>10</sup> *Kath v. Wisconsin Cent. R. Co. (Wis.)*, 99 N. W. 217; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *Soquet v. State*, 72 Wis. 659, 40 N. W. 391. So far as this applies merely to stating what is said in medical works and attempting to get before the jury indirectly what cannot be directly introduced, it is supported by most of the authorities, which, as elsewhere shown, prohibit the reading of such books themselves. But the broad statement in the cases cited and the application of the doctrine in the last case cited, so as to prohibit the physician from giving any opinion unless he had practical experience in just such cases or matters as well as book knowledge, would seem to be questionable and contrary to authorities elsewhere cited.

based upon other facts than those known to him personally, they must usually be embodied in a hypothetical question which assumes the truth of such facts for the purpose of the question and asks for his opinion, on the supposition or assumption that they exist.<sup>11</sup> The question should usually be stated in hypothetical form, but, further than this, no particular form is required,<sup>12</sup> so long as the question does not require the witness to draw conclusions and inferences, decide disputed facts, or pass on the credibility of witnesses. Under the rule already stated, however, a question such as the following, for instance, would be improper: "Upon the testimony that you have heard in this case, what is your opinion as to whether or not the defendant was guilty of negligence?" So, to take an illustration from a decided case, it would be improper to ask: "What is your opinion, based upon the testimony adduced at the trial, as to the sanity or insanity of the defendant?"<sup>13</sup> So, in another case it was held improper to ask a witness if, in his opinion, a party in any way

<sup>11</sup> *Peterson v. Chicago, &c. R. Co.* 38 Minn. 511, 39 N. W. 485; *Goodwin v. State*, 96 Ind. 550; *Armendaiz v. Stellman*, 67 Tex. 458, 3 S. W. 678; *Swensen v. Bender*, 114 Fed. 1; *Denver, &c. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77; *Magmun v. Bullion Co.* 15 Utah, 534, 50 Pac. 834. It has been held that it is no objection that the question is leading. *Alaska, &c. Min. Co. v. Keating*, 116 Fed. 561. But compare *Kahn v. Triest, &c. Co.* 139 Cal. 340, 73 Pac. 164.

<sup>12</sup> See generally as to the form and the discretion of the court. *Hunt v. Lowell Gas Light Co.* 8 Allen (Mass.) 169; *Forsythe v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408; *Jones v. President*, 88 Mich. 598, 50 N. W. 731. But it is not proper to ask an expert what his opinion is upon all the evidence given in the cause as he has heard it, as the jury could not know the facts on which he based his opinion, and whether they were proved or not, and the question should state the

facts assumed to have been proved. *People v. McElvaine*, 121 N. Y. 150; *Walker v. Rogers*, 24 Md. 238; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Craig v. Noblesville, &c. Co.* 98 Ind. 109. But see *Cooper v. Railway Co.* 54 Minn. 379, 56 N. W. 42; *Baltimore City, &c. R. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188, and authorities cited; *Schneider v. Manning*, 121 Ill. 377, 12 N. E. 267.

It seems, however, that if an expert has heard the testimony of a witness or a deposition has been read to him neither of which is cumbersome, he may be asked for his opinion, if it is based on the assumption that the matters are true as stated. *Hart v. Lowell Gas Co.* 8 Allen, 169, 85 Am. Dec. 697; *Storers Will*, 28 Minn. 9; *Bennett v. State*, 57 Wis. 69, 46 Am. R. 26; *McCullom v. Seward*, 62 N. Y. 316; *State v. Hayden*, 51 Vt. 296.

<sup>13</sup> *Reed v. State*, 62 Miss. 405. See, also, *State v. Felter*, 25 Iowa, 67; *Bennett v. State*, 57 Wis. 69; *State v. Bowman*, 78 N. Car. 509.

omitted or neglected to do anything which might have been done to save his boat, but it was said that he might properly have been asked whether certain assumed acts, shown in evidence, were seamanlike and proper.<sup>14</sup> There is, however, a possible exception to the rule requiring a hypothetical question and forbidding a witness to give an opinion based upon his understanding of the evidence, and that is where there is no dispute as to the facts and the evidence is capable of but one interpretation.<sup>15</sup> The fact that a hypothetical question is long does not necessarily render it objectionable.<sup>16</sup> Such a matter is usually left largely to the discretion of the trial judge. He may require a long question to be put in writing,<sup>17</sup> and to be so stated as not to confuse and mislead the jury. If a long, involved, and misleading question is propounded, he should exclude it,<sup>18</sup> or require it to be remoulded so that it will not confuse and mislead.

**§ 1118. Opinion based on hearsay—Statements of patient.**—The opinion of an expert must not be based on hearsay.<sup>19</sup> Thus, an opinion as to the sanity or insanity of a person based largely upon what others had told the expert outside of court as to the conduct and symptoms of such person is inadmissible.<sup>20</sup> So, it has likewise been held that an opinion of an expert witness cannot be based upon an opinion expressed by other experts, and that it is improper in asking hypothetical questions to incorporate in them the opinions of other

<sup>14</sup> *Carpenter v. Eastern Transportation Co.* 71 N. Y. 574. See, also, *Buxton v. Somerset Potters Works*, 124 Mass. 446; *Guiterman v. Liverpool, &c. Co.* 83 N. Y. 358; *People v. Lake*, 12 N. Y. S. 58; *Ruschenberg v. Southern, &c. R. Co.* 161 Mo. 70, 61 S. W. 626.

<sup>15</sup> *Rafferty v. Nawn*, 182 Mass. 503, 65 N. E. 830; *Stoddard v. Inhabitants of Winchester*, 157 Mass. 575, 32 N. E. 948, 949; *Sherman, &c. R. Co. v. Eaves*, 25 Tex. Civ. App. 409, 61 S. W. 550; *Jones v. Railway Co.* 43 Minn. 279, 45 N. W. 444; *Dwinnell v. Abbott (Wis.)*, 43 N. W. 496; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674. See, also, *Negroes v. Townshend*, 9 Md. 145; *McCollum v. Seward*, 62 N. Y. 316; *Wright v. Hardy*, 22 Wis. 348; *How-*

*land v. Railroad Co.* 115 Cal. 487, 47 Pac. 255; *Rex v. Searle*, 1 Moody & R. 75; *Pidcock v. Potter*, 68 Pa. St. 342; *State v. Klinger*, 46 Mo. 224.

<sup>16</sup> *Forsythe v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408; *Jones v. Village of Portland*, 88 Mich. 598, 50 N. W. 731.

<sup>17</sup> *Jones v. Village of Portland*, 88 Mich. 598, 50 N. W. 731.

<sup>18</sup> *Haish v. Payson*, 107 Ill. 365.

<sup>19</sup> *Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401; *Polk v. State*, 36 Ark. 117; *Hurst v. Chicago, &c. R. Co.* 49 Iowa, 76; *Louisville, &c. R. Co. v. Shires*, 103 Ill. 617; *Moore v. State*, 17 Ohio St. 521; *Wetherbee v. Wetherbee*, 38 Vt. 454.

<sup>20</sup> *Heald v. Thing*, 45 Me. 392.

expert witnesses.<sup>21</sup> But a physician may base his opinion upon what he discovered in making an examination of his patient, and may even take into consideration, in forming such opinion from such examination, statements made by the patient to him. Thus, it is said in a recent case: "The rule is well settled that a medical expert may form and express an opinion of the nature and cause of the bodily or mental condition of his patient—her ills, symptoms, pains and suffering—derived from his own knowledge, from his attendance, treatment and examinations, although based in part upon her statements and complaints made at different times as to her pains and sufferings, and, in this connection, to give his opinion whether her present condition is due to or caused by sickness, injury, accident or violence."<sup>22</sup>

**§ 1119. Right to base questions on facts according to theory of party.**—Where there is any evidence tending to prove the facts

<sup>21</sup> *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409, 421. See, also, *Link v. Sheldon*, 136 N. Y. 1; but compare *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253. Nor should they be directly called upon to state whether they agree with or differ from the opinions of other experts. *Home v. Williams*, 12 Ind. 324; nor for opinions based on conclusions of law. *Williams v. Dewitt*, 12 Ind. 309; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Pennsylvania R. Co. v. Conlan*, 101 Ill. 94; *May v. Bradley*, 127 Mass. 414. Nor upon an abstract question of ethics or morals. *Allen v. Burlington, &c. R. Co.* 57 Iowa, 623; *Missouri R. Co. v. Meckey*, 33 Kans. 298.

<sup>22</sup> *Denver, &c. R. Co. v. Roller*, 100 Fed. 738, 752, 49 L. R. A. 77; *McLain v. Railroad Co.* 116 N. Y. 460, 22 N. E. 1062; *Louisville, &c. R. Co. v. Wood*, 113 Ind. 545, 553, 14 N. E. 572, and 16 N. E. 197; *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409; *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 435, 10 Am. St. 60, 20 N. E. 284, 3 L. R. A. 434;

*Turner v. City of Newburg*, 109 N. Y. 391, 308, 16 N. E. 344; *Wilson v. Granby*, 47 Conn. 59; *Johnson v. Railroad Co.* 47 Minn. 430, 432, 50 N. W. 473; *Hatch v. Fuller*, 131 Mass. 574; *Courvoisier v. Raymond*, 23 Colo. 113, 117, 47 Pac. 284; *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Railroad Co. v. Spilker*, 134 Ind. 381, 391, 33 N. E. 280, and 34 N. E. 218; *Quaife v. Chicago, &c. R. Co.* 48 Wis. 513, 33 Am. R. 821; *McKeon v. Railway Co.* 94 Wis. 477, 483, 69 N. W. 175, 35 L. R. A. 252; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81; *Bowen v. Railway Co.* 89 Hun (N. Y.) 594, 597, 35 N. Y. S. 540; *Perkins v. Railroad Co.* 44 N. H. 223, 225; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577, 578; *Railroad Co. v. Umlin*, 158 U. S. 271, 275, 15 Sup. Ct. 840; *Davidson v. Cornell*, 132 N. Y. 238, 30 N. E. 576; *People v. Murphy*, 101 N. Y. 126, 4 N. E. 326, 54 Am. R. 661; *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397.

assumed, the fact that the court may think that they are not proved by a preponderance of the evidence does not render the question improper nor justify its rejection. Counsel have a right in such cases to frame their hypothetical questions in accordance with their theory of the evidence, and to assume such facts as they deem to be established in accordance with their theory.<sup>23</sup> It would then be for the jury to determine whether such facts were justly assumed or not. If the jury should deem the assumption false, or the preponderance of the evidence the other way, an opinion based on such assumption would be to that extent weakened or of little, if any, weight. It is, therefore, generally held, and correctly, we think, that the hypothetical question need not, ordinarily, embrace all the facts that there is evidence tending to prove. "When the question assumes the existence of any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify, and does not transcend the range of evidence, it is proper to permit such questions to be answered,<sup>24</sup> and it is not necessary that the questions shall embrace or cover all the

<sup>23</sup> *Cowley v. People*, 83 N. Y. 464, 38 Am. R. 464; *State v. Privitt*, 175 Mo. 207, 75 S. W. 457; *Goodwin v. State*, 96 Ind. 550; *Kickhofer v. Hidershide*, 113 Wis. 280, 89 N. W. 189; *Hathaway v. National Life Ins. Co.* 48 Vt. 335; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 733, 7 Am. St. 489; *City of Aledo v. Honeyman*, 208 Ill. 415, 70 N. E. 338; *State v. Anderson*, 19 Ore. 449, and authorities cited in following note. The question, it has been held in a personal injury case, may be predicated on the testimony of the plaintiff himself. *Longen v. Weltmer* (Mo.), 79 S. W. 655.

<sup>24</sup> *Denver, &c. R. Co. v. Roller*, 100 Fed. 738, 754; *Louisville, &c. R. Co. v. Wood*, 113 Ind. 545, 554, 14 N. E. 572, and 16 N. E. 197; *Stearns v. Field*, 90 N. Y. 640; *Powers v. Kansas City*, 56 Mo. App. 573, 577; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Meeker v. Meek-*

*er*, 74 Iowa, 352, 357, 37 N. W. 773; *Bever v. Spangler*, 93 Iowa, 576, 602, 61 N. W. 1072; *Schissler v. State* (Wis.), 99 N. W. 593; *Manatt v. Scott* (Iowa), 76 N. W. 717, 720; *United Rys. &c. Co. v. Seymour*, 92 Md. 425, 48 Atl. 850; *Russ v. Railroad Co.* 112 Mo. 45, 48, 20 S. W. 472, 18 L. R. A. 823; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053, 1056; *Swensen v. Bender*, 114 Fed. 1. To require a party in his hypothetical question to include the theory and evidence of his adversary conflicting with that favorable to himself would, in most cases, require him to assume the truth of that which he denies. *Goodwin v. State*, 96 Ind. 550. But see *Prentice v. Bates*, 88 Mich. 567, 50 N. W. 637; *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344; *Hamnerburg v. Metropolitan St. R. Co.* 62 Mo. App. 563; *Fisher v. Monroe*, 21 N. Y. S. 995; *Baer v. Koch*, 21 N. Y. S. 974.

facts in the case." But there should be enough facts stated on which to base an intelligent opinion;<sup>25</sup> and in a recent case it is even said that, in a civil case, all the undisputed facts must be included in a hypothetical question.<sup>26</sup>

**§ 1120. Must be evidence to support assumed facts.**—There must be some evidence tending to support the facts in a hypothetical question.<sup>27</sup> No facts should be assumed that there is not some evidence to support.<sup>28</sup> Where there is no evidence in support of facts assumed or where the questions are wholly irrelevant to the subject of the investigation, they should be excluded.<sup>29</sup> As hereafter shown, however, a more liberal rule prevails on cross-examination, and hypothetical questions are sometimes permitted on more or less imaginary facts, for the purpose of testing the witness and the weight of his evidence.

<sup>25</sup> *Hopper v. Empire City, &c. R. Co.* 79 N. Y. S. 907; *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141; *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. 47; *In re Barber's Estate*, 63 Conn. 393. And the question should not be too indefinite. *Kuhns v. Wisconsin, &c. R. Co.* 70 Iowa. 56, 31 N. W. 868; *Culbertson v. Metropolitan St. R. Co.* 140 Mo. 35, 36 S. W. 834; *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007.

<sup>26</sup> *Nichols v. Oregon, &c. R. Co.* 25 Utah, 240, 70 Pac. 996, 998. Citing *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28; *Lavinson v. Sands*, 81 Ill. App. 578; *Davis v. State*, 35 Ind. 496, 9 Am. R. 760; *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. 47. See, also, note in 39 N. W. 28.

<sup>27</sup> *Bennett v. City of Marion (Iowa)*, 93 N. W. 558; *Guetig v. State*, 66 Ind. 94; *McLean v. City of Lewiston (Idaho)*, 69 Pac. 478; *Nichols v. Oregon, &c. R. Co.* 25 Utah, 240, 70 Pac. 996; *Quinn v. Higgins*, 63 Wis. 664, 53 Am. R. 305; *Woolner v. Spalding*, 65 Miss. 204; *Hovey*

*v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Haish v. Payson*, 107 Ill. 365; *Nave v. Tucker*, 70 Ind. 15; *Quinn v. Higgins*, 63 Wis. 664, 53 Am. R. 305; *Ruscher v. City of Stanley (Wis.)*, 98 N. W. 223.

<sup>28</sup> *North Am. &c. Asso. v. Woodson*, 64 Fed. 689; *Reber v. Her-ring*, 115 Pa. St. 599 8 Atl. 830; *Bennett v. City of Marion (Iowa)*, 93 N. W. 558; *Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401; *Porter v. Ritch*, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353; *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141. Or at least there must be fair reason to suppose such evidence will be introduced. *Anderson v. Alberts-tamm*, 176 Mass. 87, 57 N. E. 215. See, also, *Coonan v. Lowenthal*, 129 Cal. 197, 61 Pac. 940.

<sup>29</sup> *People v. Augsburg*, 97 N. Y. 501; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Fairchild v. Bascomb*, 35 Vt. 398; *Williams v. Brown*, 28 Ohio St. 547; *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397; *Berry v. Safe Deposit & Trust Co.* 96 Md. 45, 53 Atl. 720; *In re Barber's Estate*, 63 Conn. 393, 27

§ 1121. **Evidence tending to prove assumed facts is sufficient.**—It is not necessary, however, that every fact assumed in a hypothetical question should be established by a preponderance of the evidence. Evidence tending to prove every fact assumed is sufficient.<sup>30</sup> Indeed, as said in substance in a recent case, direct proof of the assumed facts is not necessary; it is sufficient if the facts or circumstances in evidence are so associated with the facts proved as to render the existence of the assumed facts reasonable and probable.<sup>31</sup> It is even said that it is sufficient if the assumption is within the possible or probable range of the evidence.<sup>32</sup>

§ 1122. **Assumption of facts not proved—Promise to prove—Motion to strike out.**—In accordance with the general rule that the court, in its discretion, may admit evidence not apparently relevant at the time upon promise to introduce afterwards other evidence necessary to make it relevant, so the court may permit a hypothetical question to be asked, although it assumes facts not yet proved.<sup>33</sup> If this is done and there is no evidence given tending to establish such facts a motion should be made to strike out the answer and such motion should be sustained by the court.<sup>34</sup>

§ 1123. **Questions as to particular cases.**—Although experts often necessarily form their opinions largely from the knowledge and experience they have gained in other cases, and are usually permitted to give their reasons for their opinions,<sup>35</sup> yet they cannot, on direct

Atl. 973, 22 L. R. A. 90; *Mutual Life Ins. Co. v. Mellott*, 24 Tex. Civ. App. 355, 57 S. W. 887.

<sup>30</sup> *City of Chicago v. Early*, 104 Ill. App. 398; *Chicago, &c. R. Co. v. Wallace*, 104 Ill. App. 55, affirmed in 65 N. E. 1096; *Goodwin v. State*, 96 Ind. 550; *Stearns v. Field*, 90 N. Y. 640; *Ballard v. State*, 19 Neb. 609; *Baker v. State*, 30 Fla. 41, 11 So. 492; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Jackson v. Burnham*, 20 Col. 532, 39 Pac. 577; *Quinn v. Higgins*, 63 Wis. 664, 24 N. W. 482, 53 Am. R. 305.

<sup>31</sup> *Economy, &c. Co. v. Sheridan*, 200 Ill. 439, 65 N. E. 1070.

<sup>32</sup> *Harnett v. Garvey*, 66 N. Y. 641; *Stearns v. Field*, 90 N. Y. 640, 641.

<sup>33</sup> *People v. Sessions*, 58 Mich. 594, 26 N. W. 291, 294; *Wilkinson v. Detroit, &c. Works*, 73 Mich. 405, 41 N. W. 490; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499, 505; *Cincinnati, &c. R. Co. v. Jones*, 111 Ind. 259, 12 N. E. 113. See, also, *Anderson v. Albertson*, 176 Mass. 87, 57 N. E. 215.

<sup>34</sup> Authorities cited in last note supra.

<sup>35</sup> *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Chicago, &c. R. Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. 574; *Fairchild v. Bascomb*, 35 Vt. 398; *Leache v. State*, 22 Tex. App. 279, 58 Am. R. 638; *State v. Hooper*,



examination, be questioned as to particular cases, and the details thereof, even though they may be similar, when they have no connection with the case on trial.<sup>36</sup> To permit such questions to be asked would violate the rule that evidence must be confined to the issues, and would require an investigation of collateral matters which might not only distract the attention of the jury from the real issue and make the trial unduly long and the costs burdensome, but would also be unfair to the other party who could not be expected to anticipate and meet such testimony.

**§ 1124. Cross-examination<sup>37</sup>—Latitude allowed.**—Great latitude is allowed on the cross-examination of an expert witness.<sup>38</sup> The cross-examiner is not confined to the theory of the direct examination, but, on the contrary, he may propound hypothetical questions, leaving out facts assumed on the direct examination and putting in such facts as he thinks the evidence establishes.<sup>39</sup> Indeed, "he may assume almost any state of facts" for the purpose of testing the knowledge of the witness and the weight of his evidence,<sup>40</sup> and an appellate court

2 Bailey (S. Car.) 37. In *State v. Ryno* (Kans.), 74 Pac. 1114, it is held that an expert on handwriting may give his reasons for his opinion and explain his testimony by illustrations on a blackboard, all on examination-in-chief. See, also, *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711.

<sup>36</sup> *Horne v. Williams*, 12 Ind. 324; *Clark v. Willett*, 35 Cal. 534, 544; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Jonau v. Feraud*, 3 Rob. (La.) 366; *St. Louis Gas Co. v. American Ins. Co.* 33 Mo. App. 348. See, also, *Olmsted v. Gere*, 100 Pa. St. 127; *Ingledew v. Northern R. Co.* 7 Gray (Mass.) 91. But compare *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.* 78 Me. 274, 4 Atl. 555, holding that an expert may testify on direct examination as to experiments on which his opinion is based. And it is also held that he may cite particular instances within his own knowledge in support of his opin-

ion. *Donahue v. Railroad Co.* 159 Mass. 125, 34 N. E. 87.

<sup>37</sup> For practical suggestions as to the cross-examination of experts, see 2 Elliott's Gen. Pr. § 652.

<sup>38</sup> *McLean v. City of Lewiston* (Idaho), 69 Pac. 478; *Dilleber v. Home Life Ins. Co.* 87 N. Y. 79; *Chicago, &c. R. Co. v. Lewondowski*, 190 Ill. 301, 60 N. E. 497; *Geisendorf v. Eagles*, 106 Ind. 38; *Inland Printer Co. v. Economical, &c. Co.* 99 Ill. App. 8.

<sup>39</sup> *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409, 1 Thompson Tr. § 628; *Williams v. State*, 64 Md. 384. As to discretion of the court in permitting or refusing such questions not based on evidence, see *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072.

<sup>40</sup> *Bennett v. City of Marion* (Iowa), 93 N. W. 558, 561; *Davis v. State*, 35 Ind. 496; *People v. Augsburg*, 97 N. Y. 501; *People v. Sutton*, 73 Cal. 243. So long as they are pertinent they may be assumed for

will seldom interfere with the discretion of the trial court in permitting such questions. So, of course, he may go into details of the case as put to the witness on the examination-in-chief, and the witness may be asked, in a proper case, if he had not, on other occasions, expressed a different opinion.<sup>41</sup> But it is held in a recent case that a physician, who has testified as to the mental unsoundness of a person, cannot be asked on cross-examination, for the purpose of discrediting him, as to his testimony in other trials on the subject of insanity of other persons, and whether such persons declared by him to be insane were not subsequently declared by the courts or authorities to be sane.<sup>42</sup> In another recent case, however, it is held that for the purpose of ascertaining the peculiar and extreme views of an insanity expert his opinion regarding the sanity of a notorious assassin at the time he took the life of a public officer may be asked on cross-examination.<sup>43</sup> And where medical experts had testified for the state, on a criminal prosecution, and others had testified for the defense and drawn opposite conclusions, it was held admissible for the state, on cross-examination of the defendant's expert, to ask him if he had known the state's expert for some time, and if the latter was not regarded as an eminent authority.<sup>44</sup>

the purpose stated, although not established by the evidence. See authorities above cited in this note, also, *Williams v. Railroad Co.* 68 Minn. 55, 70 N. W. 860; *Dilleber v. Home Life Ins. Co.* 87 N. Y. 79; *Kansas City v. Marsh Oil Co.* 140 Mo. 474, 41 S. W. 943.

<sup>41</sup> *Sanderson v. Nashua*, 44 N. H. 492. See, also, *Patchen v. Astor Mut. Ins. Co.* 13 N. Y. 268; *Waterman v. Chicago, &c. R. Co.* 82 Wis. 613, 52 N. W. 252, and the reasons for the change of opinion. *People v. Donovan*, 43 Cal. 162.

<sup>42</sup> *Watts v. State (Md.)*, 57 Atl. 542. For other instances of questions held inadmissible on cross-examination of experts, see *Haverhill Loan, &c. Co. v. Cronin*, 4 Allen (Mass.) 141; *Rice v. City of Des Moines*, 40 Iowa, 638. In *Olmsted v. Gere*, 100 Pa. St. 127, it is held that a physician who is a wit-

ness, but not called nor examined in chief as an expert, cannot be questioned on cross-examination in a way that would be admissible only in case of an expert.

<sup>43</sup> *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975.

<sup>44</sup> *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38. The court said that it was competent not for the purpose of showing as affirmative evidence the ability and standing of the state's expert, but merely by way of cross-examination for the purpose of discrediting and weakening the testimony of the defendant's expert before the jury upon the points at issue between the two experts. This decision, like one or two others referred to, seems to be rather close to the line. But see, also, *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. 552.

§ 1125. **Cross-examination—Testing knowledge and weight of testimony.**—An expert witness may be cross-examined as to his knowledge of the subject about which he testified in chief and his acquaintance therewith, the sources of knowledge and reasons for his opinion, and similar matters, for the purpose of testing his knowledge and the value or weight of his opinion. Thus it has been held that where a physician testifies as a medical expert from facts learned on his personal examination of a party he may be cross-examined as to how such examination was conducted and what method was pursued.<sup>45</sup> So, in a personal injury case, although the evidence did not show that blood had flowed from the ear of the plaintiff, it was held proper on cross-examination to submit a hypothetical question, supposing that blood did so flow, for the purpose of testing the skill and accuracy of the witness as an expert.<sup>46</sup> So, where an expert had testified in chief that he had never known a person to be thrown forty feet by a train without being killed, it was held proper to ask him, on cross-examination, if he had ever heard of a certain case in which a boy had been thrown fifty feet by a train and still lived.<sup>47</sup> And, again, where a physician had testified that the plaintiff, as a result of personal injuries, had a depression of the chest, caused by adhesion of the pleura thereto, counsel was permitted, on cross-examination, to ask the witness if it was not true that numbers of men have such adhesions and still do a great deal of physical work.<sup>48</sup> In another case where a witness as to the value of certain land based his opinion on the commercial value of the sand thereon at a certain price per load it was held proper, on cross-examination, to ask him whether, in making his estimate, he considered the capital required to purchase the sand, and the interest on the investment, and what the value would be if these elements were also taken into account; but it was held improper to cross-examine him about the price that he had paid for other land.<sup>49</sup>

<sup>45</sup> *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409. See, also, *Epps v. State*, 102 Ind. 539.

<sup>46</sup> *West Chicago, &c. R. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447.

<sup>47</sup> *Chicago, &c. R. Co. v. Lewondowski*, 190 Ill. 301, 60 N. E. 497. See, also, *Birmingham, &c. Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

<sup>48</sup> *McGovern v. Smith*, 75 Vt. 104, 53 Atl. 326. See, also, *Quinn v. Hig-*

*gins*, 63 Wis. 664, 24 N. W. 482, 53 Am. R. 305; *Rowell v. City of Lowell*, 11 Gray (Mass.) 420.

<sup>49</sup> *Manning v. City of Lowell*, 173 Mass. 100, 53 N. E. 160. Compare *Pierce v. City of Boston*, 164, Mass. 92, 41 N. E. 227; *Buck v. City of Boston*, 165 Mass. 509, 43 N. E. 496; *Harris v. Schuylkill, &c. R. Co.* 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. 278.

§ 1126. **Re-examination.**—The purpose of the re-examination of an expert witness is much the same as that in the case of other witnesses, and the rules governing such re-examination are not materially different. It may be well, however, to refer to a few cases showing what has been deemed proper on the re-examination of an expert witness. In one of the most recent cases upon the subject the defendant claimed that the injuries of the plaintiff, who had instituted the action to recover damages for personal injuries, were feigned, and asked the plaintiff's expert witnesses a number of questions to establish this theory. The court held that it was proper on re-examination of such witnesses to show that from tests and observations made while examining the plaintiff they were of the opinion that her injuries were not feigned.<sup>50</sup> In an action to recover damages to lands caused from scouring of the water in a river, alleged to have been caused by an embankment erected by the defendants, the latter produced and examined an expert witness and the plaintiff on cross-examination assumed in a hypothetical question to him that the land had not been injured until immediately after the erection of the embankment, and asked him if, on such assumption, he would assign the obstruction as a cause, to which he answered that he would not if there was some other cause, but if there was no other possible cause he would. The court held that it was material for the defendant to show if there were any other adequate causes that might have produced the injury, and that this was not too speculative, but that there was no error, or at least no available error, in sustaining an objection to the question, because the court had twice ruled out similar questions on the ground that the defendant was seeking to reopen his case and because the witness had already stated that there were other causes.<sup>51</sup> The rule that an expert opinion cannot be called for upon the precise issue to be determined by the jury<sup>52</sup> applies on re-examination

<sup>50</sup> Chicago, &c. Co. v. Fortier, 205 Ill. 305, 68 N. E. 948.

<sup>51</sup> Moyer v. New York, &c. R. Co. 98 N. Y. 645. The reasoning of the court seems to indicate that the question was proper on re-direct examination, but the statement that there was no error in excluding it because it was on re-direct examination, after the court had ruled out similar questions, leaves it

doubtful as to what view the court did take of the matter.

<sup>52</sup> Stillwater Tpk. Co. v. Coover, 26 Ohio St. 520. That the question on re-examination need not always repeat the hypothesis of the question on cross-examination and that it may be construed as resting upon the same hypothesis, see McGinnis v. Kempsey, 27 Mich. 363.

as well as elsewhere, and so, in general, does the rule prohibiting inquiries into purely collateral matters.<sup>53</sup>

**§ 1127. Use of books of science and art.**—In most jurisdictions, books of science and art are not admissible in evidence to prove the opinions therein stated.<sup>54</sup> But where an expert witness has referred to a book as an authority for his opinion, he may be cross-examined thereon and the part of the book referring to the subject is admissible in that connection.<sup>55</sup> It is also held, in some jurisdictions, that, even where the witness has not mentioned any books on his examination-in-chief, books of approved authority may be referred to on cross-examination, in order to test the learning of the witness, by asking him if certain statements are not made therein relative to the subject in question.<sup>56</sup> But, in other jurisdictions, it is held that

<sup>53</sup> *Hunt v. City of Boston*, 152 Mass. 168, 25 N. E. 82. In this case a witness who had given his opinion as to the value of land and stated that it was based from sales that he knew of, was asked on cross-examination what land of the sale of which he knew was nearest the land in question, and it was held that a question on re-examination as to what such land was sold for was properly excluded.

<sup>54</sup> *Johnston v. Richmond, &c. R. Co.* 95 Ga. 685, 22 S. E. 694; *Union Pac. R. Co. v. Yates*, 79 Fed. 584, 587, 40 L. R. A. 553, and numerous authorities cited; *Carter v. State*, 2 Ind. 617; *State v. O'Brien*, 7 R. I. 236; *Ware v. Ware*, 8 Me. 57; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *State v. Boughmer*, 5 S. Dak. 461, 59 N. W. 736; *Boyle v. State*, 57 Wis. 472, 15 N. W. 827; *Washburn v. Cuddihy*, 8 Gray (Mass.) 430; *Gallagher v. Railroad Co.* 67 Cal. 13, 6 Pac. 869; *Payson v. Everett*, 12 Minn. 217; *Boehringer v. Richards & Co. (Tex.)*, 29 S. W. 508; *Collier v. Simpson*, 5 Car. & P. 73. But see *Bowman v. Woods*, 1 G. Greene (Iowa) 441; *Merkle v.*

*State*, 37 Ala. 139, 141; *Stoutemier v. Williamson*, 29 Ala. 558. Mortality tables and other books of exact science are, however, often admissible. See note in 40 L. R. A. 553; *Western Assur. Co. v. J. H. Mohlman Co.* 83 Fed. 811, 40 L. R. A. 561.

<sup>55</sup> *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *Huffman v. Click*, 77 N. Car. 55; *Jersey City Zinc Co. v. Lehigh, &c. Co.* 8 N. J. 247, 35 Atl. 915; *Waterman v. Chicago, &c. R. Co.* 82 Wis. 613, 52 N. W. 253; *Commonwealth v. Sturtivant*, 117 Mass. 122, and authorities cited in following note. See, also, *Cronk v. Wabash R. Co. (Iowa)*, 98 N. W. 884. But see *Davis v. State*, 38 Md. 15.

<sup>56</sup> *Hess v. Lowrey*, 122 Ind. 225, 233, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355; *City of Ripon v. Bittel*, 30 Wis. 614; *Connecticut, &c. Life Ins. Co. v. Ellis*, 89 Ill. 516. See, also, *Pinney v. Cahill*, 48 Mich. 584, 112 N. W. 862; *State v. Wood*, 53 N. H. 484; *Clukey v. Seattle, &c. Co.* 27 Wash. 70, 67 Pac. 379; *State v. Winter*, 72 Iowa, 627, 34 N. W. 475; *Hutchinson v. State*, 19 Neb.

this cannot be done when the witness has not referred to any book to sustain his opinion.<sup>57</sup>

**§ 1128. Limiting number of expert witnesses—Exclusion from court room—Compensation.**—It is well settled that the trial court, in the exercise of its discretion, may reasonably limit the number of expert witnesses to be heard on the trial of a cause.<sup>58</sup> It is also within the discretion of the court, we think, to exclude experts<sup>59</sup> as well as ordinary witnesses from the court room, on proper request, while others are testifying, although it is said by one court that experts should not be put under the rule, and that it may be reversible error to so exclude them while other witnesses are testifying as to the facts.<sup>60</sup> These matters, however, as well as the question of the compensation of the expert,<sup>61</sup> are treated elsewhere.

262; *Darby v. Ouseley*, 36 Eng. L. & Eq. 518, 1 Hurlst. & N. 12. But not merely for the purpose of getting them before the jury so as to evade the rule against the admission of such books.

<sup>57</sup> *Butler v. South, &c. R. Co.* 130 N. Car. 15, 40 S. E. 770 (distinguishing several of the cases cited in the preceding note); *Galveston, &c. R. Co. v. Hanway*, 24 Tex. Civ. App. 180, 57 S. W. 695; *Hanway v. Galveston, &c. R. Co.* 94 Tex. 76, 58 S. W. 724; *Fisher v. Railroad Co.* 89 Cal. 399, 26 Pac. 894; *City of Bloomington v. Shrock*, 110 Ill. 219, 51 Am. R. 679; *Davis v. State*, 38 Md. 15. See, also, *Davis v. United States*, 165 U. S. 373, 41 Sup. Ct. 750; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

<sup>58</sup> *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Farmers', &c. Asso. v. Rector*, 22 Ind. App. 101, 53 N. E. 297; *Hilliard v. Beathe*, 59 N. H. 462; *Frazer v. Jennison*,

42 Mich. 206; *Sizer v. Burt*, 4 Denio (N. Y.) 426, ante § 809.

<sup>59</sup> *Johnson v. State*, 2 Ind. 652; *State v. Zellers*, 7 N. J. L. 220; *Dyer v. Morris*, 4 Mo. 220. See, also, ante § 800.

<sup>60</sup> *Johnson v. State*, 10 Tex. App. 571. See ante § 801.

<sup>61</sup> Ante § 710. See, also, 16 Cent. Law Jour. 45. Extra compensation, even if it may be required, is not usually taxed as costs in this country. *The William Branfoot*, 52 Fed. 390; *Mark v. Buffalo*, 87 N. Y. 184; *Matter of Bender*, 86 Hun (N. Y.) 570; *Faulkner v. Hendy*, 79 Cal. 265; *Lanince County v. Lee*, 3 Colo. App. 177. In some jurisdictions, in some instances at least, the party calling the expert is held liable for his compensation. *Barnes v. Pharenf*, 166 Mass. 123, 44 N. E. 141; *Harrison v. New Orleans*, 40 La. Ann. 509; *Brown v. Travelers' Ins. Co.* 26 N. Y. App. Div. 544.

## CHAPTER LIV.

### DEPOSITIONS.

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§ 1129. **Meaning of term.**—By the term deposition is meant the testimony of a witness in due form of law taken upon interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law on the subject, and reduced to writing and duly authenticated, and intended to be used



upon the trial of an action in court.<sup>1</sup> In other words, a deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories.<sup>2</sup>

§ 1130. **Development of the law—Statutes.**—The development of the law as to depositions is very interesting. "As testimony grew to be more important in jury cases, it was more and more necessary to provide against the loss of it by death and other causes. The chancery had dealt with this by following the example of the Roman law and taking depositions *de bene esse* and *in perpetuum*. And the common law courts, under some pressure, as it would seem, from the chancery, admitted the use of depositions so taken in case of death and certain other contingencies, in order to save what might be a fatal loss of testimony."<sup>3</sup> The common law courts then coerced the parties by indirect means to consent to the examination of witnesses out of the jurisdiction; this was, later on, considered unwarranted, but statutes were then passed authorizing such courts to issue commissions for such purpose,<sup>4</sup> and there are now statutes upon the subject in every jurisdiction. The authority for taking depositions in actions at law is, therefore, considered as derived from the statutes in derogation of the common law. For this reason it is frequently said that they must be strictly complied with.<sup>5</sup>

§ 1131. **The usual methods of taking depositions.**—The two most common methods of taking depositions are: (1) Upon simple notice before officers designated by statutes, or depositions *de bene esse*,<sup>6</sup> and (2) upon a commission, or depositions *dedimus potestatem*. The first method is the more common where the witnesses are within the state, and many jurisdictions also make it the procedure when the witnesses are within any of the United States. The second method is the common procedure when the witnesses are without the United States, that is, in some foreign country. In some states, however, commissions also issue for taking testimony within the state, and

<sup>1</sup> Black Law Dict.; Bouvier Law Dict. (Rawle's ed.) 547.

<sup>2</sup> Black Law Dict. See, also, note in 13 L. R. A. 366.

<sup>3</sup> Thayer Cas. Ev. (2d ed.) 314.

<sup>4</sup> 1 Greenleaf Ev. § 320.

<sup>5</sup> Johnson v. Perry, 54 Vt. 459; Williams v. Chadbourne, 6 Cal. 559;

Simpson v. Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707; Patterson v. Wabash, &c. R. Co. 54 Mich. 91; Williams v. Banks, 5 Md. 198.

<sup>6</sup> See article in 25 Cent. Law Jour. 581; also 22 Cent. Law Jour. 581.

in many jurisdictions commissions must issue when depositions are taken at any place out of the state, either in one of the other states or in a foreign country. It will be noticed that there is a decided lack of uniformity among the statutes. Consequently, only some of the most common rules can be given in a work of this nature.

§ 1132. **When necessary to take by commission.**—It depends, then, altogether upon the statutes whether or not a commission must issue in order that depositions may be taken. Usually, as stated above, a deposition taken within the United States may be taken before certain magistrates or officers without a commission.<sup>7</sup> But when taken out of the United States it is the common rule that a commission shall issue. The statutes as to this sometimes provide that when depositions are taken out of the United States the clerk or prothonotary shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner designated to take the deposition, and that no order of court or affidavit shall be necessary to authorize the issuing of a commission. In some jurisdictions, however, no deposition can be taken under the statute unless there has been an application for it, and a judicial order for taking it has been given. In still other jurisdictions an affidavit must be served with the notice, showing that a cause for taking the deposition exists. The state statutes usually specify in what cases depositions may be taken on simple notice, and the officers before whom they may be taken are enumerated therein. It has been held that the deposition taken in another state should be taken before an officer who is recognized as a proper person to take depositions in the domestic jurisdiction, and this even though the *dedimus* and certificate of the official character of the officer had been waived.<sup>8</sup> And the courts of one state will not take judicial notice that an officer in another state has authority under the laws of that state to administer oaths, where he had no such authority at common law.<sup>9</sup>

§ 1133. **What courts may issue commissions.**—The question as to what courts may issue a commission depends upon the statute, but it is usually held that courts of limited and special jurisdiction may

<sup>7</sup> Jones v. Spring, 7 Mass. 251.

<sup>8</sup> Thompson v. Wilson, 34 Ind. 34.

<sup>9</sup> Desnoyers, &c. Co. v. First Nat. Bank, 188 Ill. 312, 58 N. E. 994;

Trevor v. Colgate, 181 Ill. 129, 54 N. E. 909; Teutonia, &c. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852; Berkeny v. Reilly, 82 Mich. 160, 46 N. W. 436.

issue a commission just as courts having general jurisdiction.<sup>10</sup> Thus, it has been held that the probate court has such power,<sup>11</sup> and also a marine court<sup>12</sup> or the surrogate.<sup>13</sup> And it has been held that clerks of district courts in Louisiana have coequal power with the judges thereof to issue commissions,<sup>14</sup> but that a referee in New York has no such power.<sup>15</sup> Courts of chancery have power, independently of statutes, to issue a commission.<sup>16</sup>

**§ 1134. Commission in blank.**—In some jurisdictions what is known as a “blank commission” may be issued. That is, a commission may be issued in which the name of the commissioner is left blank, and this blank may be filled up before the taking of the deposition or at the time it is taken.<sup>17</sup> In other jurisdictions this is unauthorized,<sup>18</sup> but it has been held that by consent of the parties a foreign commission may be issued in blank, leaving the name of the commissioner to be inserted when the deposition is taken.<sup>19</sup>

**§ 1135. Open commission.**—An open commission is one wherein the witnesses to be examined are not named or the place of examination is not fixed.<sup>20</sup> These commissions are only issued under particular circumstances.<sup>21</sup> The fact that plaintiff’s witnesses had long

<sup>10</sup> *Gildersleeve v. Atkinson*, 6 N. Mex. 250; *Paddock v. Kirkham*, 102 N. Y. 597; *Reeves v. Allen*, 42 Ind. 359.

<sup>11</sup> *In re High*, 2 Doug. (Mich.) 515; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

<sup>12</sup> *Watson v. Smith*, 13 Wend. (N. Y.) 51.

<sup>13</sup> *In re Gee’s Estate*, 33 N. Y. S. 425; a justice court in New York, *Murphy v. Sullivan*, 77 N. Y. S. 950.

<sup>14</sup> *Cannon v. White*, 16 La. Ann. 85.

<sup>15</sup> *Rathbun v. Ingersoll*, 34 N. Y. S. 211.

<sup>16</sup> *Brown v. Southworth*, 9 Paige (N. Y.) 351; *Una v. Dodd*, 38 N. J. Eq. 460.

<sup>17</sup> *Mobley v. Hamit*, 8 Ky. 589; *Dumont v. McCracken*, 6 Blackf. (Ind.) 355; *Hobbs v. Godlove*, 17

Ind. 359; *McCandless v. Polk*, 10 Humph. (Tenn.) 617; *Brackett v. Nikirk*, 20 Ill. App. 525.

<sup>18</sup> *Guice v. Parker*, 46 Ala. 616; *Rupert v. Grant*, 6 Smed. & M. (Miss.) 433; *Worsham v. Goar*, 4 Port. (Ala.) 441.

<sup>19</sup> *Carlyle v. Plumer*, 11 Wis. 96. But a commission to a person named therein cannot be executed by another. *Provident Sav. & Soc. v. Cannon*, 103 Ill. App. 535, affirmed in 66 N. E. 388.

<sup>20</sup> *Anderson Law Dict.* See, also, *Strayer v. Wilson*, 54 Iowa, 565; *McMahon v. Allen*, 18 Abb. Pr. (N. Y.) 292; *Corbin v. Anderson*, 82 N. Y. S. 683 (holding that witnesses must be named in the order for the commission).

<sup>21</sup> *Parker v. Nixon*, 1 Baldw. (U. S.) 291.

sustained friendly relations with the defendant has been held sufficient to authorize the granting of an open commission.<sup>22</sup> But an open commission will not be granted simply because the witnesses proposed to be examined may be hostile to the moving party.<sup>23</sup>

**§ 1136. Who may take depositions—In general.**—The statutes usually provide as to who may take depositions upon notice and often provide as to who may act under a commission, but “in the absence of statutory provisions any one may act who has attained the age of citizenship, who is of sound mind, not disqualified by crime, and who stands indifferent between the parties in the cause in which the testimony is required. He must bear such relation to the parties as will secure his impartiality in the execution of the commission. He, in other words, should not, directly or indirectly, bear to either party such relation as would authorize a presumption of a bias in the execution of the trust in favor of or against either party. In the absence of all prescription of fitness or qualification, it is necessary to the ends of justice, and required by the character of the trust devolved upon him.”<sup>24</sup> As stated above, the state statutes generally make provisions as to who may take depositions. In addition to those specially appointed for such purpose, as under a commission, the following are ordinarily authorized by statute to take depositions: Justices of the peace, judges, clerks of courts, notaries public, mayors, recorders of cities and consular and diplomatic officers. The state statutes often provide that depositions shall not be taken before any person being of kin to either party, or interested in the action. Thus, depositions taken before the following parties have been held to be inadmissible because of the interest or relationship existing: A deposition before an uncle,<sup>25</sup> before a brother-in-law,<sup>26</sup> before an agent or attorney of the party in the same action,<sup>27</sup> and before an official who was a law partner of one of the parties.<sup>28</sup> So, also, a deposition taken before a remote relative of one of the parties has been held inadmis-

<sup>22</sup> *Jones v. Hoyt*, 63 How. Prac. (N. Y.) 94. See *Corbin v. Anderson*, 82 N. Y. S. 683.

<sup>23</sup> *Kaempfer v. Gorman*, 63 Hun (N. Y.) 631; *Thalmann v. Importers, &c. Bank*, 77 N. Y. S. 586.

<sup>24</sup> *Weeks Depositions*, § 284.

<sup>25</sup> *Bean v. Quimby*, 5 N. H. 94.

<sup>26</sup> *Bryant v. Ingraham*, 16 Ala. 116.

<sup>27</sup> *Whicher v. Whicher*, 11 N. H. 348; *Hacker v. United States*, 37 Ct. Cl. 86.

<sup>28</sup> *Dodd v. Northrop*, 37 Conn. 216; *Swink v. Anthony*, 96 Mo. App. 420, 70 S. W. 272. But see *Potier v. Barclay*, 15 Ala. 439.

sible.<sup>29</sup> But an attorney is competent to act as commissioner if he is not of counsel nor related nor interested in the outcome of the suit.<sup>30</sup>

**§ 1137. Who may take depositions—Magistrate under special commission.**—Some states provide in their statutes that no one shall take depositions except those magistrates acting under a special commission for such a purpose.<sup>31</sup> And it has been held in some jurisdictions that depositions can be taken in the county where the suit is pending only by a commissioner appointed for that purpose under the statute,<sup>32</sup> and that a master commissioner of the circuit court to whom a cause is referred to take, state and settle an account of indebtedness, has authority to take depositions,<sup>33</sup> and also that a special commissioner has no right to delegate his authority.<sup>34</sup>

**§ 1138. Who may take depositions—Notaries public.**—The state statutes generally provide that notaries public may take depositions. It has been held that a notary public can take a deposition only when a witness resides out of a county where the trial is to be had, and a commission is regularly sued out and directed to him.<sup>35</sup> And some jurisdictions hold that a notary public of one state is not permitted to take depositions in another state.<sup>36</sup> And it has been held in Texas that a notary outside the state cannot take depositions in criminal cases.<sup>37</sup>

**§ 1139. Who may take depositions—Consular and diplomatic officers.**—Most jurisdictions allow consular and diplomatic officers to take depositions.<sup>38</sup> This is allowed in some jurisdictions even in the absence of a state statute,<sup>39</sup> and without the issuance of a special commission.<sup>40</sup> But it has been held otherwise by a lower court in Ohio.<sup>41</sup>

**§ 1140. Who may take depositions—Standing commissioners.**

<sup>29</sup> Call v. Pike, 66 Me. 350.

<sup>36</sup> Carter v. Ewing, 1 Tenn. (Ch.)

<sup>30</sup> Clopton v. Norris, 28 Ga. 188;

212.

Williams v. Rawlins, 33 Ga. 117.

<sup>37</sup> Lienpo v. State, 28 Tex. App. 179, 12 S. W. 588.

<sup>31</sup> Levally v. Harmon, 20 Iowa, 533; Newton v. Brown, 1 Utah, 287.

<sup>38</sup> Semmens v. Walters, 55 Wis. 675.

<sup>32</sup> McCann v. Beach, 2 Cal. 25.

<sup>33</sup> Hickman v. Painter, 11 W. Va. 386.

<sup>39</sup> Adams v. State, 19 Tex. App. 250.

<sup>34</sup> Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121.

<sup>40</sup> Savage v. Birkhead, 20 Pick. (Mass.) 167.

<sup>35</sup> McCann v. Beach, 2 Cal. 25.

<sup>41</sup> In re Herckelrath's Estate, 1 Ohio Dec. 696.

Some of the state statutes provide for standing commissioners before whom depositions may be taken.<sup>42</sup> But a deposition taken before a United States commissioner is not admissible in a suit pending in a state court, unless taken in accordance with the provisions of the law of such state.<sup>43</sup>

**§ 1141. Who may take depositions—Justices of the peace.**—By the statutes of most of the states justices of the peace are authorized to take depositions.<sup>44</sup> And in some jurisdictions it has been held that where a deposition to be used in a circuit court is taken in another county, it may lawfully be taken before a justice of the peace.<sup>45</sup> And it is frequently provided that a deposition to be used in one state may be taken before a justice in another state.<sup>46</sup>

**§ 1142. Who may take depositions—Miscellaneous.**—It has been held that depositions may be taken by the following: Judge of a probate court,<sup>47</sup> an assistant judge of a county court,<sup>48</sup> county clerk,<sup>49</sup> and deputy district clerks.<sup>50</sup> So depositions by some statutes may be taken by two or more commissioners or before authorized persons jointly.<sup>51</sup> And a deposition taken by two of three commissioners is admissible where the state statute required that depositions should be certified by the commissioner, or commissioners, or a majority of them.<sup>52</sup> And in a case where the defendant named one commissioner and the plaintiff two and the deposition was returned executed by the defendant's commissioner, it was held admissible because the commission was addressed to the three or either of them.<sup>53</sup> But it is held otherwise where the commission is issued to two jointly.<sup>54</sup>

**§ 1143. Grounds for taking depositions.—In general.**—The differ-

<sup>42</sup> Lyman v. Hayden, 118 Mass. 422; McCann v. Beach, 2 Cal. 25; Brandt v. Mickle, 28 Md. 436.

<sup>43</sup> Crichton v. Smith, 34 Md. 42.

<sup>44</sup> Mattocks v. Bellamy, 8 Vt. 463.

<sup>45</sup> Eslow v. Mitchell, 26 Mich. 500.

<sup>46</sup> Pike v. Blake, 8 Vt. 400.

<sup>47</sup> Fowler v. Merrill, 52 U. S. (11 How.) 375.

<sup>48</sup> City Bank v. Young, 43 N. H. 457.

<sup>49</sup> Williams v. Chadbourne, 6 Cal. 559; Bolds v. Woods, 9 Ind. App. 657, 36 N. E. 933.

<sup>50</sup> Allen v. Hoxey's Admr's, 37 Tex. 320.

<sup>51</sup> Cage v. Courts, 1 Har. & McH. (Md.) 239.

<sup>52</sup> Stone v. Cannon, 17 Miss. (9 Smedes & M.) 595.

<sup>53</sup> Loudon v. Blythe, 16 Pa. St. (4 Harris) 532, 55 Am. Dec. 527.

<sup>54</sup> Montgomery St. R. Co. v. Mason, 133 Ala. 508, 32 So. 261. As to proof of authority to take the deposition, see Wells v. Jackson Iron Mfg. Co. 47 N. H. 235, 90 Am. Dec. 575; Barron v. Pettis, 18 Vt. 385.

ent states by statute provide on what grounds depositions may be taken. These grounds differ in the different jurisdictions. Among the most usual grounds are the following: distance from the place of trial, that the witness is about to depart, non-residence of the witness, and the disability of the witness.

**§ 1144. Grounds for taking depositions—Distance from place of trial.**—The various statutes of the various states which prescribe the distance from the place of trial that a witness must reside in order that his deposition may be taken prescribe a certain number of miles, which number varies in the different jurisdictions, but the most common distance prescribed is thirty miles. The distance should be computed upon the way of usual travel from the residence of the witness to the place of trial,<sup>55</sup> or according to the usual and shortest route of public travel, and not by a straight line.<sup>56</sup> It is also held that the distance should be computed by the usual land route, and not the water route.<sup>57</sup>

**§ 1145. Grounds for taking depositions—When witness about to depart.**—Another customary ground for taking the deposition of a witness is the fact that the witness is about to depart, or is about to leave and go beyond the jurisdiction of the court.<sup>58</sup> Thus it has been held that a witness, temporarily in a state where he does not reside, may have his deposition taken as a going witness.<sup>59</sup> And that the deposition of a United States Army officer may be taken on an affidavit that he is expected to be ordered away;<sup>60</sup> and that of a traveling salesman on an affidavit that he is about to leave the state in the course of his employment.<sup>61</sup> So also, where a witness happens to be in another state, his deposition may be taken on the ground that he is about to leave beyond the court's jurisdiction.<sup>62</sup> But an affidavit that one talked of moving out of the country is of itself not sufficient.<sup>63</sup>

**§ 1146. Grounds for taking depositions—Non-residence of witness.**

<sup>55</sup> *In re Foster*, 44 Vt. 570.

<sup>56</sup> *Jennings v. Menaugh*, 118 Fed. 612.

<sup>57</sup> *Marston v. Forward*, 5 Ala. 347.

<sup>58</sup> *Burley v. Ketchell*, 20 N. J. L. 305.

<sup>59</sup> *Porter v. Beltzhoover*, 2 Har. (Del.) 484

<sup>60</sup> *Cardall v. Wilcox*, 9 Johns. (N. Y.) 266.

<sup>61</sup> *McVity v. Stanton*, 13 N. Y. S. 914. But compare *American Ex. Co. v. Bradford* (Miss.), 33 So. 843.

<sup>62</sup> *Schoneman v. Fegley*, 7 Pa. St. 433.

<sup>63</sup> *Turnley v. Evans*, 22 Tenn. (3 Hump.) 222.

The state statutes generally provide that depositions may be taken when the witness resides beyond the limits of the court's jurisdiction.<sup>64</sup> And it has been held that a permanent residence of a witness in another jurisdiction is not necessary to enable his deposition to be taken on the ground of non-residence;<sup>65</sup> and that the testimony of a witness residing out of the state may be taken, although his domicile is in that state.<sup>66</sup> So, also, that the deposition of a witness may be taken either at his place of business or his home, when the two are located in different states.<sup>67</sup> And it has been held that a statement in a deposition, by the witness, that he is a non-resident, shows sufficient grounds for taking it.<sup>68</sup>

**§ 1147. Grounds for taking depositions—Disability of witness.**—It is generally provided that, in case a witness is in any way disabled, making it impossible for him to be present at a trial, his deposition may be taken.<sup>69</sup> Thus, on account of sickness and great bodily infirmity,<sup>70</sup> his deposition may be taken. So also, where one is so sick, infirm or aged, as to make it probable that he will not be able to attend the trial, his deposition may be taken.<sup>71</sup> So, also, the deposition of one suffering under the disability of imprisonment may be taken in some jurisdictions.<sup>72</sup> And, in some jurisdictions, women may give their testimony by deposition in certain cases.<sup>73</sup> And it has been held that where, after a case was docketed for trial, the deposition of a witness who had been present, and had taken ill, could be taken.<sup>74</sup> So it has been held to be within the sound discretion of the trial court to order a deposition taken in a trial in progress, during an adjournment of the court, where the witness lives beyond the state line and is in ill health, so that he is unable to attend court.<sup>75</sup>

**§ 1148. Grounds for taking depositions—Distinguished from**

<sup>64</sup> Glenn v. Hunt, 120 Mo. 330; Matthews v. Dare, 20 Md. 248.

<sup>65</sup> Bryden v. Taylor, 2 Har. & J. (Md.) 396, 3 Am. Dec. 554.

<sup>66</sup> Rooler v. Maples, 1 Wend. (N. Y.) 65.

<sup>67</sup> Wittenbrock v. Mabins, 57 Hun (N. Y.) 146.

<sup>68</sup> Nevan v. Roup, 8 Iowa (8 Clarke) 207.

<sup>69</sup> Humbarger v. Carey, 145 Ind. 324; Matter of McCoskey, 5 Dem.

(N. Y.) 256; Lund v. Dawes, 41 Vt. 370.

<sup>70</sup> Reese v. Beck, 24 Ala. 651.

<sup>71</sup> Atkinson v. Nash, 56 Minn. 472, 58 N. W. 39.

<sup>72</sup> Hopper v. Williams, 2 Clark (Penn.), 447; Everett v. Tidball, 34 Neb. 803.

<sup>73</sup> Hewlett v. George, 68 Miss. 703.

<sup>74</sup> Dare v. McNutt, 1 Ind. 148.

<sup>75</sup> Humbarger v. Carey, 145 Ind. 324, 329, 42 N. E. 749.



**grounds for using.**—There are a few other grounds for taking depositions in some jurisdictions, and, in some, no causes are specified. It has been held that an attorney prevented from being a witness by duties in another court may have his deposition taken.<sup>76</sup> But under a statute authorizing the taking of a deposition where the witness is about to depart from the state, or by reason of age, sickness, "or other cause," shall likely be unable to attend court, an affidavit that the witness was a physician, living in another county, that he had a large practice, and that his professional engagements would probably render it unable for him to attend court, was held insufficient.<sup>77</sup>

In some states no causes for taking depositions are specified, especially where they are taken upon notice before some authorized officer, and not on commission, but the instances in which they may be used, or the grounds upon which they may be used, are specified. Under such a statute it is not essential that any particular cause should be shown to exist for the taking of the deposition, although it cannot be used unless one of the statutory causes exists for its use at the time it is sought to be used at the trial. "It is reasonable to presume," it is said, "that the legislature did not think any litigant would be willing to incur the cost and trouble of taking testimony in that mode without some reason existing for so doing. The fact that a party had instituted suit in court, and served his adversary with process, was, doubtless, thought to be a sufficient guaranty that he was taking testimony in good faith when taking depositions relating to the matter in controversy."<sup>78</sup>

**§ 1149. What stage of proceedings taken.**—The statutes of the different states in the United States vary somewhat as to the stage or stages in the proceedings of a cause when a deposition may be taken. Some jurisdictions provide that depositions may be taken in all actions by either party, in vacation or term time, at any time after service of summons, without order of court therefor. But a notice to take depositions, when the cause is not properly in court, is of no effect, and may be suppressed.<sup>79</sup> So it has been held that, after the

<sup>76</sup> *Huffman v. Barkley*, 1 Bailey (S. Car.) 34.

<sup>77</sup> *American Ex. Co. v. Bradford* (Miss.), 33 So. 843.

<sup>78</sup> *Wehrs v. State*, 132 Ind. 157, 161, 31 N. E. 779. See, also, *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701; *Meador v. Root*, 11 C. C. (Ohio) 81,

83, 5 Cir. D. 61; *Shaw v. Ohio, &c. Co.* 9 Dec. R. (Ohio) 809; *Tullis v. Stafford*, 134 Ind. 258, 33 N. E. 1023; *Olmsted v. Edson* (Neb.), 98 N. W. 415.

<sup>79</sup> *Joy v. Aultman & Taylor Mfg. Co.* 11 Ill. App. 413.

deposition has been published, the witnesses cannot be examined unless special and satisfactory reasons be shown.<sup>80</sup> And in those jurisdictions where a commission is required it is held that the commission may be obtained any time after the commencement of the suit.<sup>81</sup>

The rule that an action must have been commenced does not apply to depositions in perpetuam which will be found treated under a separate head.<sup>82</sup> But the rule is general that depositions not in perpetuam cannot be taken on a notice served before the commencement of a suit.<sup>83</sup> The service of process must be complete,<sup>84</sup> but it is not necessary that the case be at issue.<sup>85</sup> It has been held that a deposition may be taken during the progress of the trial.<sup>86</sup> And the fact that a cause is pending on appeal does not prevent a party thereto from taking depositions for the purpose of preserving testimony.<sup>87</sup>

**§ 1150. Notice—In general.**—Questions relating to notice to take depositions, like other matters relating to the taking of depositions, depend largely upon the statute, and the different states have different statutes governing the notice. But the statutes generally provide that the notice shall specify the action or cause in which the deposition is to be taken and the time and place for the taking. The notice is usually given by the party or his attorney, and served in the manner and by the person or persons hereinafter indicated; but in some jurisdictions, especially in cases in which a special order is required to be made, it is the rule that the court, magistrate or commissioner must give the notice.<sup>88</sup>

**§ 1151. Notice—Form.**—The form of the notice is usually provided for by statute. And any form of notice which complies substantially with the statute is held sufficient. It has been held, however, that a notice in writing must be signed.<sup>89</sup>

<sup>80</sup> *Hamersley v. Lambert*, 2 Johns. (N. Y.) 432. See, also, *Scott v. Scott*, 124 Ind. 66, 69, 24 N. E. 666.

<sup>81</sup> *Concklin v. Hart*, 1 Johns. (N. Y.) 103.

<sup>82</sup> See §§ 1197, 1198.

<sup>83</sup> *Howard v. Folger*, 15 Me. 447.

<sup>84</sup> *Lewis v. Northern R. Co.* 139 Mass. 294, 1 N. E. 546.

<sup>85</sup> *Buss v. Horrocks*, 1 Ohio Dec. 376; *Blackburn v. Morton*, 18 Ark. 384; *Glenn v. Brush*, 3 Colo. 26.

<sup>86</sup> *Cole v. Cole*, 12 Hun (N. Y.) 373; and during term time, *Donovan v. Hibbler* (Neb.), 92 N. W. 637.

<sup>87</sup> *Lovey v. Straus*, 124 Ind. 84, 24 N. E. 664.

<sup>88</sup> *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Tussey v. Behmer*, 9 Lane Bar. (Pa.) 45. But see *King v. Ritchie*, 18 Wis. 554.

<sup>89</sup> *Bohn v. Devlin*, 28 Mo. 319.

§ 1152. **Notice—Contents.**—As to what shall be the contents of the notice is a matter that is also provided for by statutes in the various states. In this matter also there is no absolute uniformity. It is generally provided in these statutes that the contents of the notice shall consist of a naming of the time and place of the taking of the deposition and the names of the witnesses, the cause or matter in which the deposition is to be used, and the court or tribunal in which the trial is to be had.<sup>90</sup> So also the magistrate or commissioner before whom the deposition is to be taken should be named or described in the notice.<sup>91</sup> But, in some states, the names of the witnesses and the name of the officer before whom the deposition is to be taken need not be stated,<sup>92</sup> and it is sufficient under many statutes merely to state, so far as the officer is concerned, that it is to be taken before some officer authorized to take depositions.<sup>93</sup>

As to the time, the notice should state the day and hours during which the deposition will be taken, and if taken at any time within the period it will be a sufficient compliance.<sup>94</sup> The notice usually states that the deposition will be taken at a time and place stated, and continued from time to time until completed. Under such circumstances the hearing may be adjourned from time to time until the completion of the deposition.<sup>95</sup> If the notice is in substance according to the form prescribed by statute it is sufficient.<sup>96</sup>

Notices under the following circumstances, under certain statutes, have been held sufficient: Where the name of the magistrate and the name of the witness were omitted;<sup>97</sup> naming the "City of Cleveland" without stating the county or state, in the absence of a showing of prejudice;<sup>98</sup> notice to take on two days;<sup>99</sup> where the residence of witness was omitted;<sup>100</sup> and where the names of some of the witnesses were omitted.<sup>101</sup>

<sup>90</sup> Eberhart v. State, 134 Ind. 651, 34 N. E. 637.

<sup>91</sup> Davis v. Davis, 48 Vt. 502; Kellum v. Smith, 39 Pa. St. 241.

<sup>92</sup> Neely v. Harris, Tap. (Ohio) 209.

<sup>93</sup> See Harvey v. Osborn, 55 Ind. 535.

<sup>94</sup> Pike v. Blake, 8 Vt. 400; Dill v. Camp, 22 Ala. 249.

<sup>95</sup> Kelley v. Martin, 53 Kans. 380,

36 Pac. 705; King v. State, 15 Ind. 64.

<sup>96</sup> Dorrance v. Hutchinson, 22 Me. 357.

<sup>97</sup> Neely v. Harris, Tap. (Ohio) 209.

<sup>98</sup> Straw v. Dye, 2 Ohio Dec. 312.

<sup>99</sup> Ridge's Orphans v. Lewis, Conf. (N. Car.) 483.

<sup>100</sup> Hays v. Borders, 6 Ill. 46.

<sup>101</sup> Mumma v. McKee, 10 Iowa, 107.

It has been held that the contents of certain notices were insufficient under certain statutes under the following circumstances: Where the name of person whose deposition is to be taken was omitted from notice;<sup>102</sup> where it was stated that the deposition will be taken before one of two magistrates;<sup>103</sup> where it was stated that a deposition would be taken in a certain city, without specification of the place in the city where it will be taken;<sup>104</sup> notice to take a deposition in the town of Louisville without mention of any house or place in the town;<sup>105</sup> where the name or designation of the house in the town where the deposition would be taken was omitted;<sup>106</sup> when the place where it was to be taken was omitted;<sup>107</sup> where the notice stated that the deposition would be taken on the fourth, fifth and sixth days of May, or on any one or more of said days;<sup>108</sup> where the day of taking was omitted;<sup>109</sup> where the notice stated that it will be taken at a place named "on or about" a day specified;<sup>110</sup> where the notice was to take at a point five hundred miles distant on any one of several days, extending over a period of two months,<sup>111</sup> and where the names of the parties to the action were omitted.<sup>112</sup>

§ 1153. **Notice—Service and proof of service.**—It is often provided in the statutes that the notice may be served in the same manner and by any person authorized to serve a summons for a witness.<sup>113</sup> Thus service by a private person has been held sufficient.<sup>114</sup> It is also often provided that service should be made by designated officers. Thus, sheriffs or constables have been held the proper ones to serve notice.<sup>115</sup>

It is generally held, under the statutes, that the best evidence of service is the notice itself or a properly authenticated copy of the

<sup>102</sup> Minot v. Bridgewater, 15 Mass. 492.

<sup>103</sup> Clough v. Bowman, 15 N. H. 504.

<sup>104</sup> Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183; Prather v. Pritchard, 26 Ind. 65; Rodman v. Kelly, 13 Ind. 377.

<sup>105</sup> Crozier v. Gano, 4 Ky. 257.

<sup>106</sup> McNaughton v. Lester, 2 N. Car. 423.

<sup>107</sup> Hunter v. Fulcher, 5 Rand. (Va.) 126, 16 Am. Dec. 738.

<sup>108</sup> Humphries v. McCraw, 9 Ark. 91.

<sup>109</sup> Doane v. Farrow, 9 Mart. (La.) 222.

<sup>110</sup> Miller's Adm'r v. Traman, 14 Vt. 138.

<sup>111</sup> May's Heirs v. Russell, 17 Ky. 223.

<sup>112</sup> Kingsbury v. Smith, 13 N. H. 109.

<sup>113</sup> Prather v. Pritchard, 26 Ind. 65.

<sup>114</sup> Bell v. Frye, 5 Dana (Ky.) 341.

<sup>115</sup> Parker v. Meader, 32 Vt. 300; Cullen v. Absher, 119 N. Car. 441, 26 S. E. 33.

notice and acknowledgment of service attached to the deposition. The following rules as to proof of service prevail in some jurisdictions: If served by an officer, his certificate thereof is proof; if by any other person, his affidavit thereof; in case of publication, a printed copy, with the affidavit of the printer, his foreman or clerk, or of any competent witness.<sup>116</sup> Service may also be proved by the written admission of the defendant.

There is a diversity among the statutes as to whether the service should be personal service. Some jurisdictions hold it to be necessary,<sup>117</sup> while other jurisdictions hold that the service may be made by leaving a copy,<sup>118</sup> and some statutes provide for publication in certain cases.

**§ 1154. Notice—Whether written or oral.**—The statutes generally provide that the notice shall be in writing.<sup>119</sup> In some jurisdictions, at least, it has been held that a verbal notice is sufficient if the fact of notice is not denied.<sup>120</sup> An unsigned written notice has been held insufficient;<sup>121</sup> but, where a firm of attorneys appeared of record and signed the complaint, which was verified by one of them, and he individually signed the notice to take depositions as attorney for the plaintiff, it was held that the notice was sufficiently signed to prevent the exclusion of the deposition on the ground that it was not properly signed.<sup>122</sup>

**§ 1155. Notice—On whom served.**—The statutes make provision as to who should be served with notice of the taking of a deposition. The general rule is that the party, or his agent or attorney, should be served with the notice,<sup>123</sup> and, where the defendant is a non-resident, notice to his attorney is generally sufficient.<sup>124</sup> And it has been held

<sup>116</sup> See *Thompson Ohio Tr. Ev.* § 344; *Stewart v. Townsend*, 41 Fed. 121; *Hyde v. Benson*, 6 Ark. 396. The magistrate's certificate has also been held sufficient in some cases. *True v. Plumley*, 36 Me. 466; *Norris v. Vinal*, 33 Me. 581.

<sup>117</sup> *McEwen v. Morgan*, 1 Stew. (Ala.) 190; *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Walker v. Smith*, 2 Ohio St. 593.

<sup>118</sup> *Prather v. Pritchard*, 26 Ind. 65.

<sup>119</sup> *Deming v. Foster*, 42 N. H. 165.

<sup>120</sup> *Milton v. Rowland*, 11 Ala. 732.

<sup>121</sup> *Bohn v. Devlin*, 28 Mo. 319.

<sup>122</sup> *Osgood v. Sutherland*, 36 Minn. 243, 31 N. W. 211.

<sup>123</sup> See *Great Falls Mfg. Co. v. Matthews*, 5 N. H. 574; *Bailey v. Wright*, 24 Ark. 73; *Hunt v. Crane*, 33 Miss. 669; *Katzenstein v. Raleigh, &c. R. Co.* 78 N. Car. 286; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Thompson Ohio Tr. Ev.* § 341; *Ewbank Ind. Tr. Ev.* § 195.

<sup>124</sup> *Bailey v. Wright*, 24 Ark. 73; *Pettis v. Smith*, 9 Ky. 194; *Doane v. Farrow*, 9 Mart. (La.) 222.

that notice to the attorney of record is sufficient, though he appeared without authority.<sup>125</sup> And, under some statutes, that, if a party be absent from home and from the state, notice of taking depositions must be served by leaving it at his residence, and service on his attorney also.<sup>126</sup>

When there are joint parties and persons in interest the general rule is that service should be upon all. Thus, in a suit against two joint debtors, a notice to one of them is insufficient.<sup>127</sup> Statutes, however, sometimes provide otherwise.<sup>128</sup> But service of notice upon one of two or more partners has been held sufficient.<sup>129</sup> And depositions taken upon notice to some of the adverse party have been admitted against those having notice.<sup>130</sup> The fact that the solicitor, on whom notice was served, did not know the post-office address of his client, or that the client was sick, has been held insufficient cause for granting a re-hearing.<sup>131</sup>

Notices upon the following have been held insufficient: On the overseer of the adverse party,<sup>132</sup> on the adverse party's wife,<sup>133</sup> on the adverse party's husband,<sup>134</sup> and on a station agent of a railway company.<sup>135</sup>

**§ 1156. Notice—As to time.**—As to the length of time the adverse party should have notice there is a diversity of opinion, owing largely, however, to the matter being regulated in the different states by different statutes. The most common provision of these statutes as to time is that the adverse party shall be allowed a reasonable time to travel from his usual place of abode to the place of taking the deposition, by the ordinary route of travel, exclusive of the day of service, the day of taking the deposition, and intervening Sundays. And, if served on an attorney or agent, a reasonable time in addition is usually allowed him to communicate the same to the party.<sup>136</sup>

<sup>125</sup> *Smith v. Bowditch*, 24 Mass. (7 Pick.) 137.

<sup>126</sup> *Wilson v. Drake*, 6 Tenn. 108.

<sup>127</sup> *McConnell v. Stettinius*, 7 Ill. 707. See, generally, *Black v. Marsh*, 31 Ind. App. 53, 67 N. E. 201; *Vaught v. Murray* (Ky.), 71 S. W. 924.

<sup>128</sup> *Chase v. Hathorn*, 61 Me. 505; *Ellis v. Lull*, 45 N. H. 419; *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

<sup>129</sup> *Cox v. Cox*, 2 Port. (Ala.) 533.

<sup>130</sup> *Hanly v. Blackford*, 31 Ky. 1, 25 Am. Dec. 114.

<sup>131</sup> *Foy v. Foy*, 25 Miss. 207.

<sup>132</sup> *Chapman v. Chapman*, 4 Hen. & M. (Va.) 426.

<sup>133</sup> *Bauman v. Zinn*, 3 Yeates (Pa.) 157.

<sup>134</sup> See *Danforth v. Bangor*, 85 Me. 423.

<sup>135</sup> *Atchison, &c. R. Co. v. Sage*, 49 Kans. 524.

<sup>136</sup> *Manning v. Gasharie*, 27 Ind. 399.

Some statutes provide that the notice given shall be five days.<sup>137</sup> If the statutes are silent as to the length of time, then the time allowed must be reasonable.<sup>138</sup> The same holds true as to allowance of time for travel.<sup>139</sup> In determining what is a reasonable time much depends upon the situation of the places, the facilities for travel, and the circumstances of each particular case. Thus, before the day of railroads, eight days was held insufficient to travel from a place in Indiana to a place in Ohio,<sup>140</sup> whereas the journey could now be made in a few hours. The courts, in determining this question, will usually take judicial notice of the distance, usual route, speed, and facilities for travel, so as to determine, in a general way, at least, the time required to go from the one place to the other.<sup>141</sup>

§ 1157. **Notice—Waiver.**—It is held that parties may enter into an agreement to waive notice before the testimony is taken.<sup>142</sup> Statutory notice, or defects therein, may be waived by the acts of the party to whom the notice might have been given.<sup>143</sup> Thus a party is held to have waived notice or defects therein when he is present at the taking of the deposition.<sup>144</sup> So also his cross-examination of the witness is held to be a waiver of notice,<sup>145</sup> and the acceptance of notice

<sup>137</sup> *Howell v. Howell*, 66 Cal. 390, 5 Pac. 681; *Cook v. Gilchrist*, 82 Iowa, 277, 48 N. W. 84. Notice to take on the tenth day held insufficient under a statute requiring at least ten days. *Williams v. Halford*, 67 S. Car. 296, 45 S. E. 207.

<sup>138</sup> *Marcy v. Merrifield*, 52 Vt. 606; *Garnett v. Yoe*, 17 Ala. 74; *Gordon v. Warfield*, 74 Miss. 553.

<sup>139</sup> *Central Bank v. Allen*, 16 Me. 41.

<sup>140</sup> *Cefret v. Burch*, 1 Blackf. (Ind.) 100.

<sup>141</sup> *Fitzpatrick v. Papa*, 89 Ind. 17; *Manning v. Gasharie*, 27 Ind. 399; *Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97; *Carlisle v. Tuttle*, 30 Ala. 613; ante, Vol. I, § 66.

For time held sufficient in particular cases. See authorities above cited and *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Hipes v. Cockran*, 13 Ind. 175; *Balser v. Sin-*

*ger*, 1 Ohio Dec. R. 56; *Cook v. Gilchrist*, 82 Ia. 277, 48 N. W. 84; *Trevelyan v. Lofft*, 83 Va. 141; *Smith v. Cocke*, 1 Overt. (Tenn.) 296.

For time held insufficient. See *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *Barrell v. Simonton*, 3 Cranch (U. S. C. C.) 681; *Sing Cheong Co. v. Yung Wing*, 59 Conn. 535; *Drowski v. Supreme Council*, 114 Mich. 178, 72 N. W. 169.

<sup>142</sup> *Ormsby v. Granby*, 48 Vt. 44; *Bohr v. Steamboat Baton Rouge*, 7 Smed. & M. (Miss.) 715.

<sup>143</sup> *Newton v. Brown*, 1 Utah, 287; *Bird v. Hasly*, 87 Fed. 671.

<sup>144</sup> *State v. Bassett*, 33 N. J. L. 26; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381; *Long v. Straus*, 124 Ind. 84, 24 N. E. 664.

<sup>145</sup> *Jones v. Love*, 9 Cal. 68; *Doe v. Brown*, 8 Blackf. (Ind.) 443.

without objection waives defects therein.<sup>146</sup> An agreement between the parties to a suit that depositions previously taken shall be evidence on the trial is a waiver of the failure to give notice;<sup>147</sup> and a party cannot, of course, successfully object to a deposition on the ground that he himself did not serve a proper notice on his adversary.<sup>148</sup>

**§ 1158. Attendance of witnesses.**—As to the attendance of witnesses, it is commonly provided that the officer taking the deposition shall have power to summon and compel the attendance of witnesses. And, in case of the refusal of a witness to attend or testify, such fact shall be reported by the officer to the court, and the court will order such witness to attend and testify; and, on failure or refusal to obey such order, such witness shall be dealt with as for a contempt.<sup>149</sup> Other jurisdictions sometimes give such power to the officer taking the deposition, and the power is often given to notaries public,<sup>150</sup> although there is some question, under some constitutions at least, as to whether such power can be given to a notary public.<sup>151</sup> But the mere putting a question to the witness by the attorney, and a failure to answer, there being no command by the notary, has been held to be no contempt.<sup>152</sup> Where, however, a witness refuses, and persists in refusing to answer a proper question, he may be compelled to answer by committing him;<sup>153</sup> but it has been held that, where a witness refused to answer a number of questions all addressed to the same point, he was guilty of but one contempt,<sup>154</sup> and that an officer authorized to take depositions, although vested with the power to punish

<sup>146</sup> *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459.

<sup>147</sup> *Wilkinson v. Ward*, 42 Ill. App. 541.

<sup>148</sup> *Carpenter v. Dame*, 10 Ind. 125.

<sup>149</sup> *Kellar v. B. F. Goodrich Co.* 117 Ind. 556, 19 N. E. 196; *Wehrs v. State*, 132 Ind. 157, 31 N. E. 779. In the first case cited it is also held that on the principle of comity the courts of the state in which a deposition is taken to be used in another state, when appropriately invoked, will assist an officer in their jurisdiction to secure answers to competent questions.

<sup>150</sup> *Ex parte McKee*, 18 Mo. 599; *Burnside v. Dewstoe*, 15 Wkly. Law Bul. (Ohio) 197; *In re Merkle*, 40 Kans. 27, 19 Pac. 401; *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. 692, 35 N. E. 1056.

<sup>151</sup> *In re Huron*, 58 Kans. 152, 48 Pac. 574, 62 Am. St. 614, with which compare *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. 692, and note.

<sup>152</sup> *Burnside v. Dewstoe*, 15 Wkly. Law Bul. (Ohio) 197.

<sup>153</sup> *Ex parte Livingston*, 12 Mo. App. 80. See, also, *Wehrs v. State*, 132 Ind. 157, 31 N. E. 779.

<sup>154</sup> *Maxwell v. Rives*, 11 Nev. 213.



for contempt, must not exercise it arbitrarily, and cannot rightly treat as a contempt the refusal of a witness to answer an irrelevant and improper question calling for a disclosure that would be injurious to his business.<sup>155</sup>

The subpoena issued by the officer is usually very similar to that issued for witnesses to testify in court, except that it notifies him to appear before the officer. And he has authority, in a proper case, at least where the statute so provides, to issue a subpoena duces tecum.<sup>156</sup>

**§ 1159. Oath of witnesses.**—The witness must be sworn,<sup>157</sup> and where the statute prescribes a form that form must generally be observed.<sup>158</sup> A common form of statutory provision is that the deponent shall first be sworn by the officer to testify to the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken.<sup>159</sup> Other jurisdictions hold that it is unimportant whether a witness is sworn before he gives his testimony or whether he swears to the deposition after it is made up by the magistrate.<sup>160</sup>

It is no objection that the oath administered contained more than the statute required,<sup>161</sup> but it is essential that the statute be complied with in substance.<sup>162</sup> If, however, the certificate shows that the witness was sworn "according to law," this is sufficient, at least in some jurisdictions, without setting out the oath administered.<sup>163</sup> It has also been held to be sufficient to administer the oath according to the usual and legal form in the place where the deposition is taken.<sup>164</sup> But, as notaries do not have authority to administer oaths at common law, a certificate by a notary, who took a deposition in another state, that he had administered an oath, may be insufficient, even though the statute provides that his certificate, certifying that he has such au-

<sup>155</sup> *Ex parte Jennings*, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. 720.

<sup>156</sup> *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701. But see *In re Edison* (N. J.), 53 Atl. 696.

<sup>157</sup> *Bond v. Ward*, Wright (Ohio) 747.

<sup>158</sup> *Bacon v. Bacon*, 33 Wis. 147. But an unimportant deviation may not vitiate the deposition. *Welborn v. Swain*, 22 Ind. 194.

<sup>159</sup> *Stonebreaker v. Short*, 8 Pa. St. 155.

<sup>160</sup> *Barron v. Pettes*, 18 Vt. 385. See *Donovan v. Hibbler* (Neb.), 92 N. W. 637.

<sup>161</sup> *Ballance v. Underhill*, 4 Ill. 453.

<sup>162</sup> *Cross v. Barnett*, 61 Wis. 650, 21 N. W. 832.

<sup>163</sup> *Ramsey v. Flennagan*, 33 Ind. 305.

<sup>164</sup> *Vail v. Nickerson*, 6 Mass. 262.

thority, shall be *prima facie* evidence of such authority. It has been so held in regard to *ex parte* affidavits and the like,<sup>165</sup> but it may be that such a question cannot ordinarily arise under the statutes of most of the states in regard to the taking of depositions.

**§ 1160. Manner of examination of witnesses.**—The manner of examination is substantially the same as in court. Some jurisdictions provide that the witness shall be examined by the party producing him, and then cross-examined by the adverse party, and re-examined by the parties afterward if they see cause, or, in some instances, also by the officer. But a deposition, though taken in narrative form, may be valid.<sup>166</sup>

If there is no statute or rule of court to the contrary, the law of the state from which the commission issues will control as to the method of taking the deposition.<sup>167</sup> When the English language is not understood, it is proper to have an interpreter who should be duly sworn,<sup>168</sup> although it has been held that the deposition may be written in the language of the witness and interpreted at the trial.<sup>169</sup> So it is customary for parties to agree that the examination may be taken down in shorthand, and afterwards written out and signed, or even that the signature may be waived. In case of a commission issuing, the depositions are often taken upon interrogatories and cross-interrogatories which were previously prepared by the respective parties and are sent with the commission to the officer or person known as commissioner.

**§ 1161. By whom deposition written and signed.**—A common provision in the statutes of the various states as to who should write and sign a deposition is that the deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence and under the direction of the officer; and after the same has been carefully read to or by the deponent it shall be subscribed by him.<sup>170</sup> But some jurisdictions hold that depositions in the handwriting of

<sup>165</sup> *Trevor v. Colgate*, 181 Ill. 129, 54 N. E. 909; *Desnoyers, &c. Co. v. First Nat. Bank*, 188 Ill. 312, 58 N. E. 994. See, also, *Teutonia, &c. Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852; *Berkery v. Reilly*, 82 Mich. 160, 46 N. W. 436.

<sup>166</sup> *Campau v. Dewey*, 9 Mich. 381; *Myers v. Murphy*, 60 Ind. 282.

<sup>167</sup> *McGeorge v. Walker*, 65 Mich. 5; *City Bank v. Young*, 43 N. H. 457.

<sup>168</sup> *Amory v. Fellowes*, 5 Mass. 219.

<sup>169</sup> *Cavasos v. Gonzales*, 33 Tex. 133.

<sup>170</sup> *Snyder v. Snyder*, 50 Ind. 492; *Tuthill Springs Co. v. Smith*, 90 Iowa, 331. But a failure to sign

the party offering them, or his attorney, cannot be read.<sup>171</sup> Others make the distinction that a party or his attorney may write the questions, but not the answers.<sup>172</sup> And it has been held that depositions in the handwriting of the attorney of the party offering them are admissible, if shown to have been so taken with the assent of the opposing attorney.<sup>173</sup> A witness may write in his answers himself.<sup>174</sup> And it is held, if so done, it must be in the presence of the magistrate.<sup>175</sup> But this fact may be presumed.<sup>176</sup> And it has been held that a deposition written by the witness, previously to his examination before the justice, is not a compliance with the statute.<sup>177</sup> In general, depositions reduced to writing before the examination of the witness are not valid.<sup>178</sup>

A deposition reduced to writing by the clerk of the commissioner may be admissible.<sup>179</sup> And where a magistrate, who was a poor penman, called in a third person, it was held that it answered the requirement of a certain statute, but the practice of so doing should not be encouraged.<sup>180</sup> A deposition taken with a typewriter is "reduced to writing" within the meaning of the statute.<sup>181</sup> But it has been held that if there is no stipulation or waiver as to a requirement under a certain statute that the deposition shall be written by the commissioner or witness, a deposition reduced to writing by a third person, such as a stenographer, is not a compliance with the statute.<sup>182</sup> It is held, however, that no presumption arises that the

the Christian name in full, where the initials are used, will not cause the suppression of the deposition. *Payne v. June*, 92 Ind. 252. See, also, *Abshire v. Mather*, 27 Ind. 381; *Texas, &c. R. Co. v. Walker* (Tex. Civ. App.), 60 S. W. 796.

<sup>171</sup> *Crittenden v. Woodruff*, 11 Ark. 82; *Burgess v. Grafton*, 10 Vt. 321; *Dwight v. Splane*, 11 Rob. (La.) 487.

<sup>172</sup> *Snyder v. Snyder*, 50 Ind. 492; *Murray v. Phillips*, 59 Ind. 56.

<sup>173</sup> *Farmers' & Mechanics' Bank v. Woods*, 11 Pa. St. 99; *Wertz v. May*, 21 Pa. St. 274.

<sup>174</sup> *Carlyle v. Plumer*, 11 Wis. 99; *Randal v. Chesapeake, &c. Canal Co.* 1 Har. (Del.) 233.

<sup>175</sup> *Vasse v. Smith*, 2 Cranch (U.

S.) 31; *Grayson v. Bannon*, 8 Watts (Pa.) 524.

<sup>176</sup> *Ray v. Walton*, 9 Ky. 71.

<sup>177</sup> *McEntire v. Henderson*, 1 Pa. St. 402.

<sup>178</sup> *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737. See, also, *Johnson v. Booth*, 1 Handy (Ohio) 42. But compare *Samuel Bros. Co. v. Hostetter Co.* 118 Fed. 257.

<sup>179</sup> *Read v. Randel*, 2 Har. (Del.) 500.

<sup>180</sup> *Cushman v. Wooster*, 45 N. H. 410.

<sup>181</sup> *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Saunders v. Kinchler*, 8 Ohio Dec. R. 386.

<sup>182</sup> *East Tenn. R. Co. v. Arnold*, 89 Tenn. 107.

deposition was not properly reduced to writing from the fact that it is typewritten;<sup>183</sup> and, if properly signed by the witness and officer, no objection can be raised as to that.<sup>184</sup>

**§ 1162. Sealing and other requirements before publication.**—The common provision in the statutes is that the officer taking the deposition shall seal up the same in a sufficient paper envelope and direct the same to the clerk of the court in which the action is pending, indorsing on the envelope the names of the parties and of the witnesses whose depositions are enclosed.<sup>185</sup> Many jurisdictions, however, have other and additional requirements. The deposition must be sealed up by the commissioners, so as to prevent inspection and alteration.<sup>186</sup> As to sealing, it has been held sufficient for the magistrate to seal the flap of the envelope with gum.<sup>187</sup> And a deposition properly sealed and indorsed is admissible if enclosed in an outer envelope which has nothing but the address of the clerk.<sup>188</sup>

As to the names of the parties, a mistake in the initial letter of the middle name of one of the parties, in the direction, is not a valid objection.<sup>189</sup> And in at least one jurisdiction it has been held that the court will not suppress a deposition lacking the names of the parties, unless injury may arise from the omission.<sup>190</sup> So it has been held that none of these requirements of the statutes are necessary where the commissioner personally delivers the deposition to the clerk.<sup>191</sup> And it has been held that, where a magistrate who took a deposition positively identifies it, and it was properly certified by him at the proper time, it cannot be suppressed because not sent to the clerk sealed up in an envelope as directed by the statute.<sup>192</sup> And where the envelope is lost after being filed, it has been held that the question of identity of the deposition is one of fact to be determined by the court.<sup>193</sup>

<sup>183</sup> *Behrensmeyer v. Kreitz*, 135 Ill. 591.

<sup>184</sup> *Stoddard v. Hill*, 38 S. Car. 385.

<sup>185</sup> *Lingenfelser v. Simon*, 49 Ind. 82.

<sup>186</sup> *Ward v. Ely*, 12 N. Car. 372.

<sup>187</sup> *Morgan v. Jones*, 44 Conn. 225; *Van Sickle v. Gibson*, 40 Mich. 170.

<sup>188</sup> *Evans v. Reynolds*, 32 Ohio St. 163. But compare *Barber v. Geer*, 94 Tex. 581, 63 S. W. 1007.

<sup>189</sup> *Field v. Tenney*, 47 N. H. 513.

<sup>190</sup> *Cole v. Choteau*, 18 Ill. 439.

<sup>191</sup> *Hutson v. Hutson*, 77 Tenn. 354.

<sup>192</sup> *Cowell v. State*, 16 Tex. App. 57.

<sup>193</sup> *Walbridge v. Kibbee*, 20 Vt. 543. See, also, as to including indorsements in record. *Lingenfelser v. Simon*, 49 Ind. 82, 88.

§ 1163. **Annexing exhibits.**—Papers and documents may be annexed to the deposition as exhibits in a proper case. It is held the contents of a document should not be stated, but it should be made an exhibit and attached to the deposition,<sup>194</sup> and exhibits and papers referred to in a deposition cannot be read as part thereof unless they are properly attached to the deposition.<sup>195</sup> It is proper for a witness who testifies in his deposition in relation to a writing to attach it, or in some cases a copy of it, to the deposition as an exhibit.<sup>196</sup> If the original is not controlled by the witness, or is of such a character that it cannot be suffered to go with the deposition, a copy may be used,<sup>197</sup> but the writing should be clearly identified.<sup>198</sup>

§ 1164. **Miscellaneous.**—A few of the many miscellaneous matters concerning depositions, and which it would not be feasible to discuss fully in a work of this nature, will be mentioned in this section. It is usually provided that continuances for the taking of depositions may be granted by the courts<sup>199</sup> in their discretion. A common statutory provision is, that in all actions the court may order the taking of depositions, whenever deemed necessary to determine the rights of the parties, or to expedite the trial of causes; and may, if necessary for that purpose, order a continuance. It is frequently provided that a witness for examination is not obliged to attend at the taking of a deposition in any other county than that of his residence, but may consent to do so. There may be adjournments, as when the notice contains a clause to the effect that the taking of the deposition is to be continued from day to day until completed.<sup>200</sup> The right to be present at the taking may be waived.<sup>201</sup>

<sup>194</sup> *Dailey v. Green*, 15 Pa. St. 118; *Lowry v. Harris*, 12 Minn. 255. But a reference to an exhibit attached to another deposition and expressly made part of the answer of the witness by such reference has been held sufficient. *Pope v. Anthony* (Tex. Civ. App.), 68 S. W. 521. See, also, *Mobley v. Leophart*, 51 Ala. 587.

<sup>195</sup> *Crary v. Carradine*, 4 Ark. 216.

<sup>196</sup> *Thom v. Wilson*, 27 Ind. 370; *Thompson v. Wilson*, 40 Ind. 192; *Gimbel v. Hufford*, 46 Ind. 125.

<sup>197</sup> *Thom v. Wilson*, 27 Ind. 370,

and other cases cited in last note, supra; also *Fisher v. Greene*, 95 Ill. 94.

<sup>198</sup> *Susquehanna, &c. R. Co. v. Quick*, 61 Pa. St. 329.

<sup>199</sup> *Wixom v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205; *Johnson v. Perry*, 54 Vt. 459.

<sup>200</sup> *Stainbrook v. Drawyer*, 25 Kans. 383; *King v. State*, 15 Ind. 64; *Lingenfelser v. Simon*, 49 Ind. 82; *Bueb v. Dreesen*, 104 Ill. App. 409.

<sup>201</sup> *Humbarger v. Carey*, 145 Ind. 324, 42 N. E. 749.

There may be a re-examination,<sup>202</sup> or even a retaking of depositions when there is newly discovered evidence, or other good cause for which the court in its discretion grants leave to retake the deposition,<sup>203</sup> and the court, when applied to, may have a deposition amended by returning it to the officer for the correction of mistakes,<sup>204</sup> but, ordinarily, while a deposition remains on file and unsuppressed, the deposition of the same witness cannot be retaken without leave of court.<sup>205</sup> The fact that one party has taken the deposition of a witness, however, does not necessarily prevent the other party from taking the deposition of the same witness.<sup>206</sup> Joint depositions may be taken under one commission;<sup>207</sup> and, where a deposition is lost, a copy may be admissible<sup>208</sup> on a proper showing.

**§ 1165. The caption.**—The caption of the deposition is the heading or introductory part, which shows the names of the parties and of the witnesses sworn, together with the time and place of taking the deposition.<sup>209</sup> Generally no regular form is prescribed by the statutes, and the courts hold any caption which substantially answers the purpose to be sufficient. It has been held that, where the caption and certificate are written together, and signed by the commissioner, it is as well as though he had written each separately and signed each.<sup>210</sup> And, under a certain statute, that caption may be drawn subsequently to the examination.<sup>211</sup> It has also been held that return of a commissioner need not have a caption or preamble to the answers.<sup>212</sup>

<sup>202</sup> *Parker v. Chambers*, 24 Ga. 518; *Ex parte Priest*, 76 Mo. 229.

<sup>203</sup> *Addleman v. Swartz*, 22 Ind. 249. See, also, *Hall v. Pegram*, 85 Ala. 522, 5 So. 209, 6 So. 612; *Carter v. Edmonds*, 80 Va. 56, as to discretion of the court.

<sup>204</sup> *Gartside Coal Co. v. Maxwell*, 20 Fed. 187.

<sup>205</sup> *Kirby v. Cannon*, 9 Ind. 371; *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666; *McKell v. Collins Colliery Co.* 46 W. Va. 625, 33 S. E. 765; *Newman v. Kendall*, 2 A. K. Marsh. (Ky.) 234. But see *Payche v. Shinn* (Neb.), 94 N. W. 136.

<sup>206</sup> *Woodruff v. Garner*, 39 Ind. 246, holding also that each party has the right to introduce either

or both the depositions in evidence. But see as to this last holding, *Ætna Life Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86. In *Brewer v. Bowen*, 92 Md. 567, 48 Atl. 1060, it is held that where the commission requires a return under seal there must be a seal.

<sup>207</sup> *Howe v. Pierson*, 12 Gray (Mass.) 26; *Fowler v. Merrill*, 11 How. (U. S.) 375.

<sup>208</sup> *Low v. Peters*, 36 Vt. 177.

<sup>209</sup> *Black Law Dict.*

<sup>210</sup> *Hauxhurst v. Hovey*, 26 Vt. 544. See, also, *Boykin v. Smith*, 65 Ala. 294.

<sup>211</sup> *Sayre v. Sayre's Adm'r*, 14 N. J. L. 487.

<sup>212</sup> *Flournoy v. First Nat. Bank*,

§ 1166. **Certificate of officer.**—A common statutory provision as to the certificate of the officer is that the officer shall annex a certificate to the deposition, stating the following facts: That the deponent was sworn according to law, by whom the deposition was written; and, if written by the deponent or some disinterested person, that it was written in the presence and under the direction of the officer, whether or not the adverse party attended, the time and place of taking the deposition, and the hours between which the same was taken; and the officer signs and attests the certificate, and seals the same, if he have a seal of office.<sup>213</sup>

Other jurisdictions add other provisions requiring that the certificate shall state other facts, as one or more of the following: The suit in which taken, the names of the parties, the court for which taken, the cause of taking, the fact of the presence of the party or counsel, and the oath of the witness. And it is generally held that the certificate of the officer must substantially conform to the statute or the deposition may be excluded;<sup>214</sup> but a mere immaterial clerical mistake or slight and unimportant deviation which could do no harm is not fatal.<sup>215</sup> In one jurisdiction, at least, it is held that the parties, by a stipulation to that effect, may dispense with the certificate.<sup>216</sup> It is also held that several depositions may be included in one certificate, if it is sufficiently formal,<sup>217</sup> and, in Maine, that a magistrate's certificate is conclusive as to all facts which he is required by law to state.<sup>218</sup> Statutes regulate the manner of authentication where the officer has no seal or is in a foreign jurisdiction, and it would be impracticable to consider them here. It may be noted, however, that it has been held that the court may order that a deposition be returned to the officer to affix his seal where its absence is discovered upon the publication of the deposition.<sup>219</sup>

79 Ga. 810, 2 S. E. 547. See, also, Texas, &c. R. Co. v. Walker, 25 Tex. Civ. App. 216, 60 S. W. 796.

<sup>213</sup> Harvey v. Osborn, 55 Ind. 535.

<sup>214</sup> Dye v. Bailey, 2 Cal. 383. See, also, Madison, &c. R. Co. v. White-sel, 11 Ind. 55.

<sup>215</sup> Payne v. West, 99 Ind. 390; Ramsey v. Flannagan, 33 Ind. 305. See, also, Bickley v. Bickley, 136 Ala. 543, 34 So. 946; House v. Elliott, 6 Ohio St. 497; Missouri, &c.

R. Co. of Texas v. Denton (Tex. Civ. App.), 68 S. W. 336; McCrillis v. McCrillis, 38 Vt. 135; Louisville, &c. R. Co. v. Chaffin, 84 Ga. 519; Borders v. Barber, 81 Mo. 636.

<sup>216</sup> Lockhart v. Mackie, 2 Nev. 294.

<sup>217</sup> Lord v. Siegel, 5 Mo. App. 582; Gulf City Ins. Co. v. Stephens, 51 Ala. 121. Contra: Ames v. Gatey, 1 Minn. 387.

<sup>218</sup> Medcalf v. Seecomb, 36 Me. 71.

<sup>219</sup> Hale v. Mathews, 118 Ind. 527,

§ 1167. **Certificate—Sufficiency—Illustrative cases.**—A certificate that the deposition was reduced to writing by a person named therein, and subscribed by the witness in the presence of the officer, has been held sufficient to show that it was both reduced to writing and subscribed in his presence.<sup>220</sup> So it has been held in other cases that if the name of the witness appears signed at the end of the deposition, and the certificate is otherwise sufficient, it is not necessary that it should be expressly stated that the deposition was read over to him and signed in the presence of the officer;<sup>221</sup> but there are authorities to a contrary effect.<sup>222</sup> And, under a statute requiring the certificate to state the reasons for taking the deposition, a certificate stating that they were taken in pursuance of the notice thereto attached, which notice stated the reasons, was held sufficient.<sup>223</sup> So, where the certificate states that the officer took the deposition at the time and place stated in the annexed notice, which specifically states the time and place, the certificate is sufficient in that respect.<sup>224</sup> But certificates that do not even substantially comply with the statute are insufficient.<sup>225</sup>

§ 1168. **Transmisson of deposition.**—A deposition may be sent by mail,<sup>226</sup> delivered by the commissioner in person,<sup>227</sup> or transmitted in

21 N. E. 43. But see, where he belongs in a foreign jurisdiction. *Barber v. Rickart*, 52 Ind. 594.

<sup>220</sup> *Bobilya v. Priddy*, 68 Ohio St. 373, 67 N. E. 736.

<sup>221</sup> *Payne v. June*, 92 Ind. 252; *Centre v. Keene*, 2 Cranch (U. S.) C. C. 198; *Henderson v. Cargill*, 31 Miss. 367. See, also, *Henry Sonneborn & Co. v. Southern R. Co.* 65 S. Car. 502, 44 S. E. 77; *Lewis v. Morse*, 20 Conn. 211; *Morss v. Palmer*, 15 Pa. St. 51; *United States v. Fifty Boxes, &c.* 92 Fed. 601.

<sup>222</sup> *Foster v. Bullock*, 12 Hun (N. Y.) 200; *Johnson v. Booth*, 1 Handy (Ohio) 42; *Bush v. Barron*, 78 Tex. 5, 14 S. W. 238; *Week Dep.* § 328.

<sup>223</sup> *Henderson v. Williams*, 57 S. Car. 1, 35 S. E. 261.

<sup>224</sup> *Clogg v. MacDaniel*, 89 Md. 416, 43 Atl. 795; *Walley v. Gentry*,

68 Mo. App. 298. So, as to the names of witnesses stated in a notice so referred to. *Shepherd v. Snodgrass* (W. Va.), 34 S. E. 879. See, also, for a certificate held sufficient as to the statement that the witness was sworn and as to who reduced it to writing. *Minard v. Stillman*, 39 Ore. 259, 57 Pac. 1022.

<sup>225</sup> For illustrative cases of insufficient certificates, see *Donahue v. Roberts*, 19 Fed. 863; *Case v. Garetson*, 54 N. J. L. 42; *Homberger v. Alexander*, 11 Utah, 363, 40 Pac. 260; *Madison, &c. R. Co. v. Whitesel*, 11 Ind. 55; *Western U. Tel. Co. v. Collins*, 45 Kans. 88, 25 Pac. 187, 10 L. R. A. 515.

<sup>226</sup> *Findlay v. Mineralized Rubber Co.* 98 Ga. 275, 25 S. E. 456; *Stewart v. Townsend*, 41 Fed. 121.

<sup>227</sup> *Andrews v. Parker*, 48 Tex. 94.



any other manner provided for in the statute.<sup>228</sup> Although the statute directs that depositions shall be transmitted by the officer taking them to the clerk by mail or a special messenger, it is not an objection to a deposition that the officer personally delivered it to the clerk.<sup>229</sup> Some jurisdictions hold that a party to the suit may bear the deposition from the magistrate to the clerk.<sup>230</sup> But in other jurisdictions it has been held that a deposition delivered, with the seal unbroken, to the clerk, by the party in whose behalf it has been taken, cannot be used on trial.<sup>231</sup> It has been held, however, that depositions should be suppressed if the postmaster or his deputy mailing the same fails to comply with the statute requiring him to indorse thereon that he received them from the hand of the officer before whom they were taken.<sup>232</sup> But it has also been held that the fact that a deputy clerk, instead of the clerk himself, received a deposition from the postmaster, is not good grounds for rejecting it,<sup>233</sup> and that, where a deposition is returned to the clerk by a private person, it is not necessary to prove that he was disinterested.<sup>234</sup> In one case the question arose as to whether exhibits referred to in a deposition, but mailed to the clerk in a separate package, should be considered as part of the deposition. The court held that if they were clearly identified, and especially if it was conceded that they were the exhibits in question, they were not deprived of their character as part of the deposition merely because they were mailed in a separate package instead of being attached to the deposition.<sup>235</sup>

**§ 1169. Filing of deposition.**—The state statutes in regard to filing the depositions also vary. In some jurisdictions it is provided that every deposition intended to be read in evidence must be filed in court at least one day before the time at which the cause in which the deposition is to be used stands on the docket for trial; or, if filed afterward, and sought to be used on the trial, that the adverse party shall be entitled to a continuance, at the costs of the party filing the deposition, upon showing good cause by affidavit.<sup>236</sup> Other provisions in

<sup>228</sup> *Avery v. Avery*, 12 Tex. 54, 62 Am. Dec. 513.

<sup>229</sup> *Andrews v. Parker*, 48 Tex. 94.

<sup>230</sup> *Logan v. Hodge's Adm'r*, 7 Ala. 66; *Veach v. Bailiff*, 5 Har. (Del.) 379; *Homer v. Martin*, 6 Con. (N. Y.) 156.

<sup>231</sup> *Breeding v. Stamper*, 57 Ky. 175.

<sup>232</sup> *Laird v. Ivens*, 45 Tex. 621.

<sup>233</sup> *Louisville, &c. R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. 891.

<sup>234</sup> *Dill v. Camp*, 22 Ala. 249.

<sup>235</sup> *Bird v. Halsy*, 87 Fed. 671.

<sup>236</sup> *Dare v. McNutt*, 1 Ind. 148 (under a former statute); *Hale v. Mathews*, 118 Ind. 527; *Thompson Ohio Tr. Ev.* § 355. See, also, *Her-*

other statutes are that the deposition must be filed on the first day of the term,<sup>237</sup> filed at the term for which it was taken,<sup>238</sup> and filed within twenty days from the taking and certification.<sup>239</sup> And it has been held, under a certain statute, that depositions are inadmissible unless they have been filed one entire day before the commencement of the trial,<sup>240</sup> and that it is the duty of the party taking a deposition to file it.<sup>241</sup> But it has been held that depositions to be used before a referee need not be filed in the clerk's office before they are opened,<sup>243</sup> and that, although a deposition is not filed until the day of the trial, if the adverse party has actual notice thereof, and proceeds to trial without objection or exception, he cannot afterwards object to the use of the deposition on the ground that it was not filed in time.<sup>244</sup>

§ 1170. **Publication.**—Statutes commonly provide that a deposition, after being filed, may be published by the clerk, at the request of either party, after giving the other, his agent or attorney, reasonable notice of the time of publication; or they may be published by order of the court on the motion of either party. The filing and opening of depositions in the clerk's office is held equivalent to a publication.<sup>245</sup> In some jurisdictions it is held that it is a fatal objection that depositions were opened out of court.<sup>246</sup> In other jurisdictions it is held that if opened by mistake they may be received and filed on affidavit of the fact.<sup>247</sup> It has also been held that a commission may be opened by a judge in vacation.<sup>248</sup>

Under most statutes neither party is under any legal obligation to publish a deposition before he is ready to use it, and, as the privilege to have it published is open to both, neither can complain of delay of the other to have it published.<sup>249</sup> Nor does the fact that the jury

man v. Schlesinger, 114 Wis. 382,  
90 N. W. 460.

<sup>237</sup> Phelps v. Hunt, 40 Conn. 97.

<sup>238</sup> Witzle v. Collins, 70 Me. 290,  
35 Am. R. 327.

<sup>239</sup> Shoemaker v. Stiles, 102 Pa. St.  
549.

<sup>240</sup> Evars v. Hardgrove, 11 Tex.  
210.

<sup>241</sup> Smith v. Austin, 4 Brewst.  
(Pa.) 89.

<sup>243</sup> Ladd v. Lord, 36 Vt. 194.

<sup>244</sup> Straw v. Dye, 2 Ohio Dec. R.  
312, 3 Ohio Dec. R. 260.

<sup>245</sup> Proprietors, &c. v. Proprietors,  
&c. 24 Mass. 344.

<sup>246</sup> Beale v. Thompson, 12 U. S.  
70.

<sup>247</sup> Law v. Law, 4 Me. 167; and in  
Hughes v. Humphreys, 102 Ill. App.  
194, it is held that the fact that it  
has been improperly opened by the  
clerk without order or leave of  
court is not ground for striking it  
out where no harm has been done.

<sup>248</sup> Den v. Wood, 10 N. J. L. 73.

<sup>249</sup> Mitten v. Kitt, 118 Ind. 145, 20  
N. E. 724.

had been sworn, or part of the evidence heard, deprive the court of the power to order it published on proper application.<sup>250</sup>

**§ 1171. When deposition admissible—In general.**—The grounds or causes for the admission of depositions are regulated by statute in the various jurisdictions. These grounds vary as the statutes vary. Among the grounds for admission the statutes generally provide that depositions are admissible in the following cases: Death of the witness, absence of the witness from the county (or, in some jurisdictions, the county or the adjoining county), or from the state, and age, infirmity or sickness of the witness. And where there has been a failure to complete a deposition, due to inevitable accident, neither party being to blame, the deposition has been admitted.<sup>251</sup>

**§ 1172. When depositions admissible—In case of old age, illness or physical ailment.**—When the witness is too sick to be present in court his deposition may be received in evidence.<sup>252</sup> The affidavit of a witness eight days before trial that, from his age and infirmities, he is unable to attend court, has been held sufficient to authorize his deposition to be read in evidence.<sup>253</sup> And where the deposition of a witness had been taken because he was too old and infirm to attend court it was held admissible, without proof at the time of the trial, that the same had diminished.<sup>254</sup> And the deposition of a woman advanced in pregnancy, and who had probably been delivered about the time of the trial, has been held admissible.<sup>255</sup> But the question is as to whether a cause for using the deposition exists at the time of the trial, and not merely whether it existed at the time the deposition was taken. Thus, if the witness has recovered, and is able to attend court, his deposition cannot be used in evidence.<sup>256</sup>

**§ 1173. When deposition admissible—In case of death.**—In case

<sup>250</sup> *Harter v. Seaman*, 3 Blackf. (Ind.) 27; *Mitten v. Kitt*, 118 Ind. 145, 20 N. E. 724.

<sup>251</sup> *Blair v. Carpenter*, 75 Mich. 167, 42 N. W. 790.

<sup>252</sup> *Johnson v. Sargent*, 42 Vt. 195; *Hanley v. Banks*, 6 Okla. 79, 51 Pac. 662; *Norris v. Norris*, 3 Ind. App. 500, 28 N. E. 1014; *Hunsinger v. Hoffer*, 110 Ind. 390, 11 N. E. 463.

<sup>253</sup> *Taylor v. Smith*, 10 Gratt. (Va.) 557.

<sup>254</sup> *Weaver v. Peteet*, 26 Ga. 292. So, in *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463, on the presumption that the witness continued ill and the presentation of a physician's certificate to that effect.

<sup>255</sup> *Barton v. Morphis*, 15 N. Car. 240.

<sup>256</sup> *Hann v. Wilson*, 28 Ind. 296. See, also, *Sax v. Davis*, 71 Iowa, 406, 32 N. W. 403.

of death the statutes provide that the deposition is admissible. Thus, where the deposition is taken on the ground that the witness is about to leave the state, and he dies before leaving the state, his deposition is admissible.<sup>257</sup> And, under the statute, it is generally held that the deposition of a party to the suit may be read at the trial, though his death before trial has precluded the adverse party from testifying.<sup>258</sup>

**§ 1174. When deposition admissible—In case of absence from the jurisdiction.**—In case the witness is absent from the jurisdiction, his deposition is generally admissible in evidence.<sup>259</sup> Some statutes so provide in case of “absence from the county,”<sup>260</sup> while others so provide in case the witness is “more than one hundred miles away,”<sup>261</sup> and still other statutes make different provisions. It is also held, in some jurisdictions, that the party must show that he has used due diligence to find the deponent, or that he is not within the jurisdiction of the court,<sup>262</sup> and it has been decided that, in case a witness cannot be found, his deposition may be admitted.<sup>263</sup>

If the witness has stated in his deposition that he was about to leave the state, proof that he has not returned to his home may raise a presumption that he is still absent,<sup>264</sup> and the presumption has also been indulged that he continues to reside where he resided at the time the deposition was taken.<sup>265</sup> But, if it is shown that he is residing in the county at the time of the trial, his deposition should be excluded,<sup>266</sup> unless some other cause is shown for its use.

**§ 1175. When depositions admissible—Some other cases.**—Among the other grounds on which it has been decided that depositions may be admitted are the following: Insanity,<sup>267</sup> disqualification by interest<sup>268</sup> since the deposition was taken, and when the depositions have

<sup>257</sup> *Goodwyn v. Lloyd*, 8 Port. (Ala.) 237.

<sup>258</sup> *King v. Patt*, 13 R. I. 132; *Keran v. Trice's Ex'rs*, 75 Va. 690.

<sup>259</sup> *Johnson v. Sargent*, 42 Vt. 195; *Hoopes v. De Vaughn*, 43 W. Va. 447, *Ewbank Ind. Tr. Ev.* § 183; *Thompson Ohio Tr. Ev.* § 355.

<sup>260</sup> *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Thompson Ohio Tr. Ev.* § 355.

<sup>261</sup> *Mulcahey v. Railroad Co.* 69 Fed. 172; *Texas, &c. R. Co. v. Reagan*, 118 Fed. 815.

<sup>262</sup> *Tompkins v. Wiley*, 6 Rand. (Va.) 242.

<sup>263</sup> *Pettibone v. Derringer*, 4 Wash. C. C. 215; *Burton v. State*, 107 Ala. 68.

<sup>264</sup> *Stockton v. Graves*, 10 Ind. 294.

<sup>265</sup> *Texas, &c. R. Co. v. Reagan*, 118 Fed. 815; *Waters v. Wing*, 59 Pa. St. 211.

<sup>266</sup> *Indianapolis, &c. R. Co. v. Stout*, 53 Ind. 143.

<sup>267</sup> *R. v. Marshall*, Car. & M. 147.

<sup>268</sup> *Wells v. Ins. Co.* 187 Pa. St. 166,

been taken by agreement of parties, or by order of the court trying the cause. So, also, it is often provided that when the deponent is a state or county officer, or a judge, or a practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside, in either of the foregoing cases the attendance of the witness cannot be enforced, and the deposition is admissible.

**§ 1176. When depositions admissible—Cause must continue to exist.**—Many state statutes provide that, when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists. But it is generally held that a deposition may properly be used for any of the causes specified in the statute, although taken to be used for a different cause, which no longer exists.<sup>269</sup> And, if the legal cause for taking a deposition no longer exists at the time of the trial, the proof to exclude it must, in some cases, come from the adverse party.<sup>270</sup> That is, the cause is presumed, in some cases, to continue to exist unless it be shown to have ceased by the party objecting.<sup>271</sup>

**§ 1177. When deposition admissible—Where deponent is present.** As a general rule, a deposition cannot be used by the party taking it when the witness is present in court.<sup>272</sup> There are, however, some cases where a deposition is admissible even though the deponent is present in court at the time of the trial. Thus, the deposition of the adverse party may be used against him as an admission, though incompetent as a deposition,<sup>273</sup> and, in some instances, where the deposition comes up in a case from an inferior court.<sup>274</sup> So, in some cases, it is held to be within the discretion of the court to admit the deposition.<sup>275</sup> Thus, the deposition of a witness living beyond the reach

40 Atl. 802; *Lanman v. Piatt*, 1 Ohio Dec. R. 135.

<sup>269</sup> *Great Falls Bank v. Farmington*, 41 N. H. 32.

<sup>270</sup> *Logan v. Monroe*, 20 Me. 257.

<sup>271</sup> *Randolph v. Woodstock*, 35 Vt. 291; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463.

<sup>272</sup> *East Tenn. &c. R. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; *Louisville, &c. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 661; *Whitford v. Clark Co.* 119 U. S.

522; *Mobile Ins. Co. v. Walker*, 58 Ala. 290.

<sup>273</sup> *Goldsohl v. Chatham Nat. Bank*, 80 Mo. 626. See, also, *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

<sup>274</sup> *Gilchrist v. Partridge*, 73 Me. 214.

<sup>275</sup> *Hittson v. State Nat. Bank, &c. (Tex.)*, 14 S. W. 780; *Louisville, &c. R. Co. v. Steenberger*, 24 Ky. 761, 69 S. W. 1094. See, also, *Sherrod v. Hughes (Tenn.)*, 75 S. W. 717.

of process may be read, even where he has been produced and examined by the adverse party, if the latter has discharged him and caused him to go home before the party who took his deposition had an opportunity to use him.<sup>276</sup> So depositions taken by agreement, to be used in evidence, may be read though the witness is present at the trial.<sup>277</sup>

§ 1178. **Whether part of deposition may be offered.**—It is held, in many jurisdictions, that all or none of a deposition must be offered in evidence, or, at least, that the court may refuse to permit the party who took the deposition to read only a part,<sup>278</sup> but other cases hold that the one offering it may read what he chooses, and the other party has the privilege of reading the omitted portions.<sup>279</sup> The better rule seems to be that, while the court may, in its discretion, permit a part of a deposition to be read by the party offering it, all that is competent and relevant to the particular point in question should be read, and he cannot arbitrarily select such portion as he desires and omit other portions directed to the same point.<sup>280</sup> But the whole matter would seem to be largely within the discretion of the trial court, and if the entire deposition is read, so far as admissible, there would seem, ordinarily, at least, to be no available error, no matter whether it was all read by one party or not.

<sup>276</sup> *Louisville, &c. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611; *Shirts v. Irons*, 37 Ind. 98.

<sup>277</sup> *Estep v. Larsh*, 21 Ind. 183; *Shirts v. Irons*, 37 Ind. 98.

<sup>278</sup> *Lanahan v. Lawton*, 50 N. J. Eq. 276, 23 Atl. 476; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Crocker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169; *Cook Brewing Co. v. Ball*, 22 Ind. App. 656, 52 N. E. 1002; *Grant v. Pendery*, 15 Kans. 236. See, also, *Edwards v. Crenshaw*, 30 Mo. App. 510; *Dawson Town, &c. Co. v. Woodhull*, 67 Fed. 451.

<sup>279</sup> See *Byers v. Orensstein*, 42 Minn. 386, 44 N. W. 129; *Watson v. St. Paul City R. Co.* 76 Minn. 358, 79 N. W. 308; *Whitman v. Morey*, 63 N. H. 448; *Watson v. Winston* (Tex. Civ. App.) 43 S.

W. 852; *Hammatt v. Emerson*, 27 Me. 308; *Despatch Line v. Glenney*, 41 Ohio St. 166, 177; *Curtis v. Parker & Co.* 136 Ala. 217, 33 So. 935.

<sup>280</sup> *First Nat. Bank v. Minneapolis, &c. Co.* (N. Dak.), 91 N. W. 436, 441; *McCartney v. Smith*, 10 Kans. App. 580, 62 Pac. 546; *Kilbourne v. Jennings*, 40 Iowa, 473; *Prewitt v. Martin*, 59 Mo. 325; *Grant v. Pendery*, 15 Kans. 236; *Bank v. McSpedon*, 15 Wis. 628. So held as to use of deposition taken by adversary. *Citizens' Bank v. Rhutasel*, 67 Iowa, 316, 25 N. W. 261. In *Hoadley v. Savings Bank*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321, it is held to be within the discretion of the trial court to permit a portion of a deposition to be read in chief and the remainder to be read in rebuttal.

§ 1179. **Use of deposition by adverse party.**—A party who has caused a deposition to be taken and filed is not obliged to read it in evidence, but, if he does not, his adversary may do so. This is the rule sustained by the better reason as well as the weight of authority,<sup>281</sup> although there is some slight dissent, and particular statutes may change the rule. The question then arises as to the effect of reading a deposition taken by the other party. It seems that he thereby adopts the deposition as his own, and is, ordinarily, precluded from denying its legality or competency, and may not impeach the witness any more than he would be allowed to do so, in the particular jurisdiction, if he had called and introduced the witness in person.<sup>282</sup> And, on the other hand, the party who took the deposition may impeach or contradict the witness when it is introduced by his adversary,<sup>283</sup> and it has even been held that he has the same right to object, as respects matters of substance, even to his own interrogatories, as if the deposition had originally been taken by the other party.<sup>284</sup> But it has been held that, where the witness is not competent to testify to facts stated in his deposition, and the objection to his competency has not been waived, but is properly made, the deposition should be excluded; and that taking a deposition to break the force of another deposition of the same witness, taken by his adversary over a party's

<sup>281</sup> In re Smith, 34 Minn. 436, 26 N. W. 234; Adams v. Russell, 85 Ill. 284; Hatch v. Brown, 63 Me. 410; O'Connor v. American, &c. Co. 56 Pa. St. 234; Echols v. Staunton, 3 W. Va. 574; Hazelton v. Union Bank, 32 Wis. 34; Brandon v. Mullinix, 11 Heisk. (Tenn.) 446; Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116, 86 N. W. 913; Curtis v. Parker & Co. 136 Ala. 217, 33 So. 935; Woodruff v. Garner, 39 Ind. 246; Carpenter v. Dame, 10 Ind. 125; Straw v. Dye, 2 Ohio Dec. R. 312; Andrews v. Watson, 12 Ohio Cir. Dec. 686. See, also, In re Hercules Ins. Co. L. R. 13 Eq. 566. But compare Harris v. Leavitt, 16 Tex. 340; San Antonio, &c. R. Co. v. Harrison, 72 Tex. 478; Webster v. Calden, 55 Me. 165; Sullivan v. Norris, 8 Bush (Ky.) 521; Rucker v. Reid, 36 Kans. 468.

<sup>282</sup> Jewell v. Center, 25 Ala. 498; Fountain v. Ware, 56 Ala. 558; Crowder v. Nelson, 32 Miss. 260; Barry v. Galvin, 37 How. Pr. (N. Y.) 310. But see Crocker v. Agendbroad, 122 Ind. 585, 24 N. E. 169. He cannot object to the testimony as hearsay and incompetent when he offers the deposition himself. Roller v. James, 6 Kans. App. 919, 49 Pac. 630. See, also, Arnold v. Garth, 106 Fed. 13.

<sup>283</sup> City of Bloomington v. Osterle, 139 Ill. 120, 28 N. E. 1068; Eliot v. Shultz, 10 Humph. (Tenn.) 234. But see Jordan v. Jordan, 3 Thomp. & C. (N. Y.) 269; Forward v. Harris, 30 Barb. (N. Y.) 338.

<sup>284</sup> Hatch v. Brown, 63 Me. 410; In re Smith, 34 Minn. 436, 26 N. W. 234. But see George Adams, &c. Co. v. South Omaha Nat. Bank, 123 Fed. 641.

objection, is not a waiver of the objection that the witness is incompetent.<sup>285</sup>

§ 1180. **Objections—In general.**—There is more diversity, perhaps, in regard to the matter of objections, among the statutes and the decisions in the various states, than on any other matter connected with the subject of depositions. Below are given some of the general rules, but there are other jurisdictions, aside from those cited, which have statutes materially different. It is a matter concerning which there should be greater uniformity, on account of depositions in so many cases being taken in other states than that of the trial, and the lack of uniformity makes it uncertain, in some instances, as to what rules to follow. It is the safest plan to make objections at the earliest opportunity, and this, as a rule, will be no bar to a subsequent objection for the same cause should it be desired to make it.

“No general rule can be laid down in respect to unfinished testimony. If substantially complete, and the witness is prevented by sickness or death from finishing his testimony, whether viva voce or by deposition, it ought not to be rejected, but submitted to the jury with such observations as the particular circumstances may require. But, if not so far advanced as to be substantially complete, it must be rejected.”<sup>287</sup> So, under a principle already considered, if there is no opportunity for cross-examination, the deposition may, in most jurisdictions, be rejected.<sup>288</sup>

In general, objections concerning the relevancy and materiality of the evidence may be made at the trial,<sup>289</sup> while those relating to the form and validity of the deposition, and the like, that are apparent before the trial, and cannot be cured by the introduction of other evidence at the trial, should be made before the trial, so that the other party may know in advance that he can read the deposition in evidence or prepare to make good the defects.<sup>290</sup> If the objection is not

<sup>285</sup> *Ætna Life Ins. Co. v. Denning*, 123 Ind. 384, 24 N. E. 86.

<sup>287</sup> *Fuller v. Rice*, 4 Gray (Mass.) 343.

<sup>288</sup> See *Buller, Nisi Prius*, 240.

<sup>289</sup> *Tays v. Carr*, 37 Kans. 141, 14 Pac. 456; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260; *Terre Haute, &c. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Indianapolis, &c. R. Co. v. Anthony*, 43 Ind. 183;

*Hughes v. Humphreys*, 102 Ill. App. 194; *Memphis, &c. R. Co. v. Maples*, 63 Ala. 601; *Leavitt v. Baker*, 82 Me. 26, 19 Atl. 86.

<sup>290</sup> *Glen v. Clore*, 42 Ind. 60; *Truman v. Scott*, 72 Ind. 258; *Stull v. Howard*, 26 Ind. 456; *Willeford v. Bailey*, 132 N. Car. 402, 43 S. E. 928; *Woodard v. Cutter*, 2 Neb. Unaffirmed, 84, 96 N. W. 54; *Doane v. Glenn*, 21 Wall. (U. S.) 33; *Samuel*



made when it ought to be it will be considered as waived, and cannot, ordinarily, at least, be made thereafter.<sup>291</sup> So there are cases, especially where the objection is first made before an officer who has no power to rule upon it, in which the objection must be renewed at the trial, or, at least, brought to the attention of the court and ruled upon at the proper time.<sup>292</sup>

§ 1181. **Objections—To competency.**—The statutes differ as to when objections to the competency of a deponent should be made. A common provision is that objections to the competency of a deponent may be made at the time of taking his deposition, or in court, whether made at the taking of the deposition or not. And under such a statute objections to the competency of a witness, or evidence, may be first made on the trial.<sup>293</sup> It has been held that, if a witness is competent at the time the deposition is taken, but is not at the time of the trial, his deposition is not admissible,<sup>294</sup> but this certainly cannot

*Bros. & Co. v. Hostetter Co.* 118 Fed. 257; *Pittsburgh, &c. R. Co. v. Story*, 104 Ill. App. 132; *Holman v. Bachus*, 73 Mo. 49; *Wright v. Cabot*, 89 N. Y. 570; *MacRae v. Kansas City, &c. Co.* 64 Kans. 580, 68 Pac. 54; *Cowan v. Ladd*, 2 Ohio St. 322; *Crowell v. Bank*, 3 Ohio St. 406. See, also, *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950.

<sup>291</sup> *Hahn v. Bettinger*, 81 Minn. 91, 83 N. W. 467; *Savage v. Gaut* (Tenn. Chan. App.), 57 S. W. 170; *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840; *Bartlett v. Hoyt*, 33 N. H. 151; *Frazier v. Malcom*, 22 Ky. L. R. 1876, 62 S. W. 13, and authorities cited in last note, *supra*. As to effect of cross-examining witness whose testimony is incompetent, not being a waiver where objection is properly made, see *Mason v. Willhite* (Tenn. Ch. App.), 61 S. W. 298; *Griffith v. McCandless*, 9 Kans. App. 794, 59 Pac. 729; *Miffin v. Bingham*, 1 Dall. (U. S.) 272. But compare *Brice v. Lide*, 30 Ala. 647, 68 Am. Dec. 148; *Smith v. Proffitt*, 82 Va.

832; *Barnhardt v. Smith*, 86 N. Car. 473;

<sup>292</sup> *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840; *Valentine v. Middlesex R. Co.* 137 Mass. 28; *Loaper v. Bell*, 1 Head (Tenn.) 373; *Black v. Lamb*, 12 N. J. Eq. 108. So, as already intimated, appearing and taking part in the examination may constitute a waiver of notice, and the like. *Barnhardt v. Smith*, 86 N. Car. 473; *Long v. Straus*, 124 Ind. 84, 24 N. E. 664; *Shulte v. Thompson*, 15 Wall. (U. S.) 151; *Goodfellow v. Landis*, 36 Mo. 168; *Weil v. Silverstone*, 6 Bush (Ky.) 698; *Cameron v. Cameron*, 15 Wis. 1. But see *Harris v. Wall*, 7 How. (U. S.) 692.

<sup>293</sup> *Myers v. Murphy*, 60 Ind. 282; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860. See, also, *Whitney v. Haywood*, 6 Cush. (Mass.) 82; *Lord v. Moore*, 37 Me. 208; *Barton v. Trent*, 3 Head (Tenn.) 167. But compare *Hair v. Little*, 28 Ala. 236; *Winslow v. Newlan*, 45 Ill. 145; *Gilkey v. Peeler*, 22 Tex. 663.

<sup>294</sup> *Jones v. Scott*, 2 Ala. 58; *Seabright v. Seabright*, 28 W. Va. 412.

be the rule in all cases.<sup>295</sup> And it has also been held that if he was incompetent at the time it was taken, a subsequent change in status does not render the deposition competent.<sup>296</sup> But it has been held, on the other hand, that if a witness, after having given his deposition, becomes interested in the event of the suit, his deposition might be used in a subsequent trial of the same cause as it might be if he were dead.<sup>297</sup>

**§ 1182. Objections—To propriety of questions.**—As to objections to the propriety of questions there is also a conflict in the statutes and decisions of the various states. In many jurisdictions it is held that all objections to the propriety of any questions proposed, as well as to competency, may be made at the time of taking the deposition, or in court, whether made at the taking of the deposition or not. The officer who takes the deposition, ordinarily, has no authority to pass upon such objections, and most of the statutes permit them to be made upon the trial, but, as hereafter shown, objections to the form of a question, as that it is leading, or the like, should usually be made and noted at the time, or, at least, before the trial.

**§ 1183. Objections—To validity.**—There is a great diversity of opinion as to when objections to the validity of a deposition should be made, but in most jurisdictions objections to the validity of any deposition, or to its admissibility in evidence, in many instances, must be made before entering upon the trial; yet any deposition, after the commencement of the trial, may usually be suppressed, if any matter which is not disclosed in the deposition then appears for the first time which is sufficient to authorize such suppression.

Thus, in Indiana, objections appearing on the face of a deposition must generally be made before the trial is commenced;<sup>298</sup> but, if the

<sup>295</sup> *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *Wells v. New Eng. Mut. Life Ins. Co.* 187 Pa. St. 166, 40 Atl. 802.

<sup>296</sup> *Burton v. Baldwin*, 61 Iowa, 283, 16 N. W. 110, citing *Doty v. Wilson*, 14 Johns. (N. Y.) 379; *Heyl v. Burling*, 1 Cal. (N. Y.) 14; *City Council v. Haywood*, 2 Nott & McC. (S. Car.) 557. See, also, *Smith v. Proffitt*, 82 Va. 832; *Sabine v. Strong*, 6 Met. (Mass.) 270; *Scammon v. Scammon*, 33 N. H. 52; *Reed*

*v. Rice*, 25 Vt. 171. But compare *Mitchell v. Haggemyer*, 51 Cal. 108; *Haynes v. Rowe*, 40 Me. 181; *Messimer v. McCray*, 113 Mo. 382; *Hartford Fire Ins. Co. v. Green*, 52 Miss. 332; *Seabright v. Seabright*, 28 W. Va. 415.

<sup>297</sup> *Gold v. Eddy*, 1 Mass. 1; *Wells v. New Eng. Mut. Life Ins. Co.* 187 Pa. St. 166, 40 Atl. 402.

<sup>298</sup> *Fruchey v. Eagleson*, 15 Ind. App. 88; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950.

grounds of objection are not apparent on the face of the deposition, the objection may usually be made when the deposition is offered in evidence.<sup>299</sup> It has also been held that objections to depositions are too late if first made after the empaneling of the jury for the trial;<sup>300</sup> that objections that the names of the parties are not properly indorsed on the envelopes must be made before the publication of the depositions;<sup>301</sup> and that it is improper to receive depositions offered in evidence without first considering and passing upon objections made to them by counsel.<sup>302</sup> And the objection to testimony in a deposition, it has been held, must be clearly established in order to exclude it.<sup>303</sup>

**§ 1184. Objections—To interrogatories.**—A different rule from the general one is commonly held as to objections to interrogatories. But there is also a diversity in the statutes and rulings in this matter. A common holding is that objections on the ground that interrogatories were leading cannot be made at the trial,<sup>304</sup> but must be made before the commission is forwarded.<sup>305</sup> The reason usually assigned is that, if the objection had been made, it could have been obviated by changing the form of the question.

**§ 1185. Suppressing and striking out depositions.**—A deposition taken unfairly, or without authority of law, may be suppressed; also where no commission was issued to the officers.<sup>306</sup> So, where a party is deprived of his right of cross-examination,<sup>307</sup> or has met with unreasonable interference on the part of the commissioner, the deposition should be suppressed;<sup>308</sup> and the same is true where there has been

<sup>299</sup> *Hazlett v. Gambold*, 15 Ind. 303.

<sup>300</sup> *Ash v. Warlow*, 20 Ohio, 119; *National, &c. Co. v. Dunn*, 106 Ind. 110 (after jury is sworn).

<sup>301</sup> *Lingenfelser v. Simon*, 49 Ind. 82.

<sup>302</sup> *Verret v. Bonvillain*, 32 La. Ann. 29.

<sup>303</sup> *Jones v. Smith*, 6 Iowa, 229.

<sup>304</sup> *Goodrich v. Hanson*, 33 Ill. 498; *Sheeler v. Speer*, 3 Bin. (Pa.) 130; *Crowell v. Bank*, 3 Ohio St. 406; *Wolverton v. Ellis*, 18 Iowa, 413; *Hennessy v. Met. Life Ins. Co.* 74 Conn. 699, 52 Atl. 490; *Butte Hard-*

*ware Co. v. Wallace*, 59 Conn. 336, 22 Atl. 330.

<sup>305</sup> *Hill v. Canfield*, 63 Pa. St. 77; *Winn v. Twogood*, 9 La. 422; *Franks v. Gress Lumber Co.* 111 Ga. 87, 36 S. E. 314.

<sup>306</sup> *Western Union Telegraph Co. v. Haman*, 2 Tex. Civ. App. 100; *Hacker v. United States*, 37 Ct. Cl. (U. S.) 86.

<sup>307</sup> *Forest v. Kissam*, 7 Hill (N. Y.) 464; *Hewlett v. Wood*, 67 N. Y. 394.

<sup>308</sup> *Hacker v. United States*, 37 Ct. Cl. (U. S.) 86.

a substantial failure to follow the statutory requirements.<sup>309</sup> So, in many jurisdictions, a deposition or particular parts of a deposition may be struck out or suppressed because the evidence is inadmissible or the witness incompetent.<sup>310</sup> Parts of a deposition incompetent and immaterial may be struck out or suppressed, while the parts material and admissible will not be,<sup>311</sup> if the deposition was properly taken and the witness is competent. But evidence that may be relevant or become relevant at the trial should not be struck out on the ground of irrelevancy before the trial.<sup>312</sup> So, the refusal of a contumacious witness to answer a proper question without any fault of either of the parties, has been held not to be cause for suppressing so much of his deposition as has been taken.<sup>313</sup> And various harmless failures to comply strictly with the statute have been held insufficient cause for suppressing depositions.<sup>314</sup> It is also said that it is largely in the discretion of the court as to whether or not a deposition shall be suppressed.<sup>315</sup> And some of the statutes provide that on unimportant deviation from any direction relative to taking depositions shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party.<sup>316</sup> The motion to suppress a deposition should, for safety, be made, and a ruling, or refusal to rule, obtained before the trial, and an exception

<sup>309</sup> *In re Thomas*, 35 Fed. 337; *Carter v. Mannings*, 7 Ala. 851; *Hacker v. United States*, 37 Ct. Cl. (U. S.) 86.

<sup>310</sup> *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890; *Balkwill v. Furnishing Co.* 62 Ill. App. 663.

<sup>311</sup> *Ramsey v. Flannagan*, 33 Ind. 305; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860. But a portion of an answer should not be struck out or suppressed and another portion left in when the result would be to make the answer essentially different from what the witness testified to. *McCormick v. Smith*, 127 Ind. 230, 26 N. E. 825.

<sup>312</sup> *Terre Haute, &c. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Indianapolis, &c. R. Co. v. Anthony*, 43 Ind. 183. See, also, *Horseman v. Todhunter*, 12 Iowa, 230.

<sup>313</sup> *Kellar v. B. F. Goodrich Co.*, 117 Ind. 556, 19 N. E. 196. See, also, and compare *Galveston, &c. R. Co. v. Baumgarten* (Tex. Civ. App.), 72 S. W. 78. But this has been held sufficient ground in other cases. *Chase v. Kenniston*, 76 Me. 209; *Hadra v. Utah Nat. Bank*, 9 Utah, 412, 35 Pac. 508; *Harris v. Miller*, 30 Ala. 221; *Fulton v. Golden*, 28 N. J. Eq. 37.

<sup>314</sup> *Commercial Nat. Bank v. Atkinson*, 62 Kans. 775, 64 Pac. 617; *Galveston, &c. R. Co. v. Morris*, 94 Tex. 505, 61 S. W. 709.

<sup>315</sup> *Smith v. Groneweg*, 40 Minn. 78; *Semmens v. Walters*, 55 Wis. 675.

<sup>316</sup> *Payne v. West*, 99 Ind. 390.

reserved, and in some jurisdictions this is absolutely necessary to save the objection in many instances. The motion should specifically state the grounds of objection,<sup>317</sup> and if directed to only a part of the deposition, it should specifically point it out.<sup>318</sup>

**§ 1186. When used in another action.**—As to the use of a deposition in another action there are different statutes in the different jurisdictions. In some jurisdictions it is provided by statute that when an action has been dismissed and another action has been commenced for the same cause, the depositions taken in the first action may be used in the second or any other action between the parties, or their assignees or representatives for the same cause; but it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them. A few statutes, however, seem to have nothing upon the subject, and under a statute which contains no provision for using depositions taken in another action, but which merely provides that depositions may be read in evidence on the trial of any suit in which they are taken, it is held that they cannot be used in another action even though the parties and issues are substantially the same in both actions.<sup>319</sup> It has been held that a deposition taken for and used upon the hearing of a petition for a new trial may be afterwards used upon the trial of the original cause,<sup>320</sup> and that a deposition taken on a rule to open a default can be used on

<sup>317</sup> *Manning v. Gasharie*, 27 Ind. 399; *Fitzpatrick v. Papa*, 89 Ind. 17; *Murray v. Phillips*, 59 Ind. 56. See, also, *First Nat. Bank v. Rush*, 85 Fed. 539; *Stebbins v. Duncan*, 108 U. S. 32; *Allen v. Babcock*, 15 Pick. (Mass.) 56.

<sup>318</sup> *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459; *Payne v. June*, 92 Ind. 252; *Mercer v. Patterson*, 41 Ind. 440; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Day v. Raguet*, 14 Minn. 273. As to the rule that a party cannot ordinarily obtain the suppression of a deposition taken by himself, see *Carpenter v. Dame*, 10 Ind. 125; *Memphis, &c. Co. v.*

*Pikey*, 142 Ind. 304, 40 N. E. 527; *Board of Com'rs v. O'Connor*, 137 Ind. 622, 35 N. E. 1006.

<sup>319</sup> *People's Nat. Bank v. Mulkey*, 94 Tex. 395, 60 S. W. 753; *Same v. Same* (Tex. Civ. App.), 61 S. W. 528. See, also, *Shepherd v. Willis*, 19 Ohio, 142, 145; *O'Harra v. Hunt*, 19 Ohio, 460. Probably for good cause shown, such as the death of the witness, and for impeaching purposes or the like, the deposition might be used in a proper case even in the absence of such a statute, under principles already considered.

<sup>320</sup> *Spear v. Coon*, 32 Conn. 292.

the subsequent trial,<sup>321</sup> and so where the previous cause terminated by a non-suit instead of a trial.<sup>322</sup> So, also, a deposition taken in a suit pending before a justice of the peace may be read in the circuit court on an appeal of the same case.<sup>323</sup> And at a hearing before an auditor depositions may be used which were taken to be used on a trial of the case.<sup>324</sup> So, it has been held that depositions taken in a proceeding in equity may be subsequently used in a suit at law between the same parties.<sup>325</sup> And it is generally held, under the statutes, that depositions taken in another suit between the same parties, where the same property was involved and the same questions were in dispute, are admissible.<sup>326</sup> But if read in another case, it must be between the same parties and relate to the same subject matter,<sup>327</sup> or it must be a case where the same points are in issue.<sup>328</sup> And depositions taken in one suit are generally held not admissible in another for or against one not a party to the former suit nor privy to either party in the former suit.<sup>329</sup> It has been held that where an action is separated and docketed as two separate actions, the plaintiff being the same in each and some of the original defendants being the defendants in each, a deposition taken in the original action may

<sup>321</sup> *Riegel v. Wilson*, 60 Pa. St. 388.

<sup>322</sup> *Wertz v. May*, 21 Pa. St. 274.

<sup>323</sup> *Jarrett v. Phillips*, 90 Ill. 237. See, also, *In re Arrosmith's Est.* 206 Ill. 352, 69 N. E. 77.

<sup>324</sup> *King v. Hutchins*, 28 N. H. 561.

<sup>325</sup> *Gove v. Lyford*, 44 N. H. 525. But not where the issues are different. *Reed, &c. v. Gold (Va.)*, 45 S. E. 868.

<sup>326</sup> *Brooks v. Cannon*, 9 Ky. 525; *Parsons v. Parsons*, 45 Mo. 265; *McConnel v. Smith*, 27 Ill. 232; *Haupt v. Henninger*, 37 Pa. St. 138; *Briggs v. Briggs*, 80 Cal. 253; *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 454.

<sup>327</sup> *Crawford v. Word*, 7 Ga. 445.

<sup>328</sup> *Taylor v. Bank of Ill.* 23 Ky. 576; *Haupt v. Henninger*, 37 Pa. St. 138. "Identity of subject matter in whole or in part, and identity of parties in interest, must unite to

render a deposition in one case admissible in another," and a deposition taken in an action by deponent's wife to recover damages for personal injuries to her, though the husband is made a formal party but has no interest, is held not admissible in an action against the same defendant by the wife as administratrix of the deponent to recover damages for injuries to him received at the same time and place and through the same cause. *Fearn v. West Jersey Ferry Co.* 143 Pa. St. 122, 22 Atl. 708, 13 L. R. A. 366. See, also, *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228.

<sup>329</sup> *Rowe v. Smith*, 1 Call. (Va.) 487; *Peery v. Moore*, 24 Mo. 285; *Turnley v. Hanna*, 82 Ala. 139, 2 So. 483; *Cookson v. Richardson*, 69 Ill. 137; *Rutherford v. Gedder*, 4 Wall. (U. S.) 220; *Miller v. Gillespie (W. Va.)*, 46 S. E. 451.

be used in either of those into which it is separated, on the ground that each is a continuation of the action in which the deposition was taken.<sup>330</sup> Parties may by agreement make a deposition taken in another action between themselves or even between third persons admissible.<sup>331</sup> But where a deposition is offered under an alleged agreement of this kind and such agreement is denied, a ruling of the trial court excluding a deposition not otherwise admissible will not readily be disturbed on appeal.<sup>332</sup>

**§ 1187. Rule when two depositions appointed for same time by same party.**—It sometimes occurs that the same party appoints two depositions to be taken at the same time. In such a case if both are attended both may be admissible; if neither is attended no objection can be raised as it is waived by non-attendance; if one is attended the other cannot be used over proper objection by the other party who was unable to attend its taking.<sup>333</sup>

**§ 1188. Refreshing memory from deposition.**—The subject of refreshing the memory of a witness is elsewhere considered, but it may here be stated that when a party has been surprised by the testimony of his own witness he may usually refresh the memory of the witness by the aid of his deposition.<sup>334</sup> This refreshing of the memory may be accomplished either by the witness referring to it, or by the attorney's oral reference to it or by his reading from the deposition to the witness.<sup>335</sup> The practice varies somewhat in different states.

**§ 1189. Compensation of officer or commissioner.**—The compensation of a commissioner is regulated by the law or rules of the jurisdiction issuing the commission,<sup>336</sup> and in case there is no fixed com-

<sup>330</sup> *Maxwell v. Brooks*, 54 Ind. 98.

<sup>331</sup> *Malone v. Stickney*, 88 Ind. 594; *Parlin, &c. Co. v. Hutson*, 198 Ill. 389, 65 N. E. 93.

<sup>332</sup> *Gemmell v. Brown*, 25 Ind. App. 6, 56 N. E. 691. See, also, *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359, 47 Atl. 209.

<sup>333</sup> *Cole v. Hall*, 131 Mass. 88; *Kimpton v. Glover*, 41 Vt. 284; *Faust v. Miller*, 17 Gratt. (Va.) 226; *Wytheville, &c. Co. v. Teiger*, 90 Va. 279, 18 S. E. 195; *Hankinson v. Lombard*, 25 Ill. 468; *Collins v.*

*Richart*, 14 Bush (Ky.) 621; *Evans v. Rothschild*, 54 Kans. 747, 39 Pa. St. 701.

<sup>334</sup> *Atkins v. State*, 16 Ark. 568, 589; *State v. Miller*, 53 Iowa, 209; *State v. Staton*, 114 N. Car. 813, 19 S. E. 96.

<sup>335</sup> *Harvey v. State*, 40 Ind. 519; *Hurley v. State*, 46 Ohio St. 320; *Beaubien v. Cicotte*, 12 Mich. 459, 485.

<sup>336</sup> *Watkins v. McDonald*, 70 Mo. App. 357; *Peters v. Rand*, 108 Pa. St. 255.

pensation he should be given a reasonable fee.<sup>337</sup> And it has been held that one is not warranted in withholding the depositions taken by him because his fees have not been paid.<sup>338</sup> It has been held, also, that the fee of an officer for "taking a deposition including caption and certificate," does not include his fee for writing the deposition.<sup>339</sup>

**§ 1190. Costs.**—In the matter of costs, also, there is a diversity among the statutes and the rules of the courts of the different jurisdictions. It has been decided in one jurisdiction that the costs of taking depositions in good faith are properly taxed against the party losing the case, though the party taking them does not use them, and the witnesses thus examined are examined *viva voce* at the trial.<sup>340</sup> But it is sometimes provided that if a party who gives notice to take depositions fails to take the same, he will be liable to the adverse party who attends for expenses, unless a good excuse is shown for not taking the depositions.<sup>341</sup>

**§ 1191. Depositions under federal statutes—When and how taken.**—The federal statutes make provision also for the taking of depositions. They provide, in substance, that the testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States or out of the district in which the case is to be tried and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm.<sup>342</sup> The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or a superior court, mayor or chief magistrate of a city, judge of a county

<sup>337</sup> *Lyman v. Hayden*, 118 Mass. 422; *The Frisia*, 27 Fed. 480.

<sup>338</sup> *Melvin v. Handly*, 1 Wilcox (Pa.) 235.

<sup>339</sup> *Lockwood v. Cobb*, 5 Vt. 422.

<sup>340</sup> *Gulf, &c. R. Co. v. Evansich*, 61 Tex. 3. See, also, *Hunter v. International R. Co.* 28 Fed. 842; *Lindy v. McChesney* (Cal.), 74 Pac.

1034; *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174.

<sup>341</sup> *Whitestown, &c. Co. v. Zahm*, 10 Ind. App. 471, 36 N. E. 764.

<sup>342</sup> *Harris v. Wall*, 7 How. (U. S.) 693; *The Samuel*, 1 Wheat. (U. S.) 9; *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Bird v. Halsy*, 87 Fed. 671; 2 *Desty's Fed. Proc.* § 382.



court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney of either of the parties nor interested in the event of the cause.<sup>343</sup> Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record as either may be nearest, and the notice must state the name of the witness and the time and place of the taking of his deposition.<sup>344</sup> In all cases in rem, the person having the agency or possession of the property at the time of seizure is deemed the adverse party until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other person the giving of the notice is impracticable, such depositions as there shall be urgent necessity for taking may be taken upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section in the same manner as witnesses may be compelled to appear and testify in court.<sup>345</sup>

### § 1192. Depositions under federal statutes—Oath and writing

<sup>343</sup> *Fowler v. Merrill*, 11 How. (U. S.) 375; *Voce v. Lawrence*, 4 McLean (U. S. C. C.) 203; *Whitney v. Hunt*, 5 Cranch C. C. 120; *Dinsmore v. Maroney*, 4 Blatchf. (U. S. C. C.) 416; *Garey v. Union Bank*, 3 Cranch C. C. 91. But not before a township justice. *Shulte v. Thompson*, 15 Wall. (U. S.) 151.

<sup>344</sup> *Egbert v. Citizens' Ins. Co.* 7 Fed. 51; *American Exch. Nat. Bank v. First Nat. Bank*, 82 Fed. 961 (as to what constitutes reasonable notice); *Dunlop v. Monroe*, 1 Cranch (U. S.) 536; *Carrington v. Stinson*, 1 Curt. (U. S. C. C.) 437; *Claxton v. Adams*, 1 McAr. 496. Where the United States is a party it is held that notice must be given to the district attorney. *The Argo*, 2 Gall. 314, Fed. Cas. No. 517. As to when notice need not be given, see *Dick v. Runnels*, 5 How. (U. S.) 7; *Miller v. Young*, 2 Cranch C. C. 53. For

defects in notice held not sufficient to vitiate the deposition, see *Gonnley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453.

<sup>345</sup> R. S. U. S. § 863. It has been held that if a witness, under instructions from his counsel refuses to answer, his entire deposition may be stricken from the files. *Thompson, &c. El. Co. v. Jeffrey Mfg. Co.* 83 Fed. 614; *Bird v. Halsey*, 87 Fed. 671. That a notary has no right to issue a subpoena duces tecum and compel the production of private papers under this section, see *Daucel v. Goodyear, &c. Co.* 128 Fed. 753. See, also, *Stevens v. Missouri, &c. R. Co.* 104 Fed. 934. That a deposition de bene esse cannot be taken under this section in a foreign country, see *The Alexandria*, 104 Fed. 904.

**of deposition.**—There is a special section in relation to the oath of the witness and the writing down of the deposition. This section provides that every person deposing, as provided in the section already referred to, shall be cautioned and sworn to testify to the whole truth and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by the deponent himself in the officer's presence and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.<sup>346</sup> The witness must be properly sworn,<sup>347</sup> but it has been held that he may be sworn after the deposition is reduced to writing,<sup>348</sup> and that if he is properly sworn no other cautioning is necessary.<sup>349</sup> The deposition must also be reduced to writing and signed as provided in this section,<sup>350</sup> and should be properly certified by the officer.<sup>351</sup>

**§ 1193. Depositions under federal statutes — Transmission and when used.**—The statutes provide that the deposition shall either be delivered personally to the court for which it was taken or sealed and transmitted to the court. And as to when it may be used it is provided that unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment he is unable to travel and appear in court, such deposition shall not be used in the cause.<sup>352</sup> It was held in a suit in admiralty that where an interpreter, whose services were necessary, refused to act further after part of a deposition had been taken, and another interpreter could not be obtained before the

<sup>346</sup> R. S. U. S. § 864.

<sup>347</sup> *Shutte v. Thompson*, 15 Wall. (U. S.) 151; *Pendleton v. Forbes*, 1 Cranch C. C. (U. S.) 507.

<sup>348</sup> *Tooker v. Thompson*, 3 McLean, 92 Fed. Cas. No. 14097.

<sup>349</sup> *Brown v. Pratt*, 2 Cranch C. C. 253; *Moore v. Nelson*, 3 McLean, 383, Fed. Case No. 9791. But see *Luther v. The Merritt Hunt*, Newb. Adm. 4 Fed. Cas. No. 8610.

<sup>350</sup> *Bell v. Morrison*, 1 Pet. (U. S.) 352; *Cook v. Burnley*, 11 Wall. (U. S.) 659; *Thorpe v. Simmons*, 2 Cranch C. C. (U. S.) 228; *Moller v. United States*, 57 Fed. 490.

<sup>351</sup> *Harris v. Wall*, 7 How. (U. S.) 693; *Van Ness v. Heincke*, 2 Cranch C. C. (U. S.) 259; *Payton v. Veitch*, 2 Cranch C. C. (U. S.) 123; *Pendleton v. Forbes*, 1 Cranch C. C. (U. S.) 507; *Tooker v. Thompson*, 3 McLean (U. S.) 92; 2 Destr. Fed. Proc. §§ 383, 384.

<sup>352</sup> R. S. U. S. § 865; *Patapsco Ins. Co. v. Southgate*, 1 Pet. (U. S.) 604; *The Samuel*, 1 Wheat. (U. S.) 9; *Park v. Willis*, 1 Cranch (U. S.) 357; *Zych v. American, &c. Co.* 127 Fed. 723; 2 Destr. Fed. Proc. § 384.

witness left the port, that the part of the deposition that had been taken could not be read on the trial.<sup>353</sup> In another case a deposition of a party as to transactions with another party was taken while the latter was alive, and it was held that it could be used when the suit was revived in the name of the executor of the latter party, although he had died without giving his deposition as he might have done.<sup>354</sup>

**§ 1194. Depositions under federal statutes—Other methods.**—The federal statutes also provide other methods for taking depositions. One section provides that “in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court in the United States.”<sup>355</sup> It is also provided that any United States court may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam memoriam*, which would be so admissible in a court of the state wherein such cause is pending according to the laws thereof.<sup>356</sup> And in addition it is further provided that it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.<sup>357</sup> It has been held in a number of cases that this section merely affects the mode of taking depositions by permitting them to be taken in the mode prescribed by the state law as well as in the manner already provided by act of Congress; and that

<sup>353</sup> *Schiaffino v. The Jacob Brando*, 33 Fed. 160.

<sup>354</sup> *McMullen v. Ritchie*, 64 Fed. 253.

<sup>355</sup> R. S. U. S. § 866. Such a deposition is not to be considered as taken *de bene esse*. *Sargeant v. Biddle*, 4 Wheat. (U. S.) 508; *Jones v. Oregon, &c. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7486. For decisions under this statute, see 2 *Desty Fed. Proc.* § 385. For an application held sufficient to entitle a party to a *dedimus potestatem* under this section, see the recent case of *Zych v. American, &c. Co.* 127 Fed. 723.

<sup>356</sup> R. S. U. S. § 867. It has been held under this section that if such deposition is not admissible in the state court it is not admissible in the federal court. *Gould v. Gould*, 3 Story, 516, Fed. Cas. No. 5637. See, also, and compare *Seeley v. Kansas City Star Co.* 71 Fed. 554. And that where the case falls under Section 866, from which we have quoted above, an application under this section will be denied. *Richter v. Jerome*, 115 U. S. 55.

<sup>357</sup> R. S. U. S. § 866, 27 U. S. St. § 7.

it does not extend the right to take depositions so as to authorize the examination of an adverse party by deposition or interrogatories before trial;<sup>358</sup> but other cases hold that it does authorize such an examination under the state law.<sup>359</sup>

§ 1195. **Depositions in criminal cases.**—There are separate statutory provisions in most jurisdictions concerning depositions in criminal cases. In both the national and state constitutions there is a provision that in all criminal prosecutions the accused shall have the right to meet the witness face to face. But the statutes permitting the taking of depositions in criminal cases upon consent of the parties are held constitutional, since the accused may waive his right to be confronted with the witnesses on the part of the state,<sup>360</sup> and he does this by consenting to the deposition being taken. But he can never be required to take depositions unless he consents or waives his right to be confronted by the witness.<sup>361</sup> A common statutory provision as to depositions in criminal cases is that the defendant may, by leave of court, take the depositions of witnesses residing out of the state to be read on the trial; but before leave is given the defendant must enter of record his consent that the depositions of witnesses residing out of the state may be taken and read on behalf of the state relative to the same matter; and the defendant may, on the same terms, by leave of court or by notice to the prosecuting attorney take the deposition of any witness conditionally. Some states, however, do not have such a provision in the statutes. In a comparatively recent case the question was discussed in a juris-

<sup>358</sup> *Shellbarger v. Oliver*, 64 Fed. 306; *National Cash Register Co. v. Leland*, 77 Fed. 242, 94 Fed. 502 (on appeal); *Despeaux v. Penna. R. Co.* 81 Fed. 897; *Zych v. American, &c. Co.* 127 Fed. 723.

<sup>359</sup> *International Tooth Crown Co. v. Hanks*, 101 Fed. 306; *Smith v. Northern Pac. R. Co.* 110 Fed. 341; *International Tooth Crown Co. v. Carter*, 112 Fed. 396.

<sup>360</sup> *Butler v. State*, 97 Ind. 373, 378. See, also, *Ex parte Kindt*, 32 Ore. 474, 52 Pac. 187.

<sup>361</sup> But it is held that he is entitled to be so confronted only once, and that depositions taken at a

preliminary hearing may be made admissible, in case of death of the witness, or the like. *Territory v. Evans*, 2 Idaho, 627, 23 Pac. 232; *State v. McO'Brien*, 24 Mo. 412. See, also, *Gilbreath v. State*, 26 Tex. App. 318, 9 S. W. 618; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *State v. Valentine*, 7 Ired. L. (N. Car.) 225; *Bostick v. State*, 3 Humph. (Tenn.) 344. That the statutes as to civil procedure do not apply, see *Watkins v. United States*, 5 Okla. 729, 50 Pac. 88; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Toniblin*, 57 Kans. 841, 48 Pac. 144.

diction where there is no such statute. The court among other things states: "In criminal cases there is no statute in this state authorizing the issuance of a commission to take testimony of a witness out of the state as in civil cases. While such commission might be issued in a criminal case by consent of parties, the court has no authority to issue such commission without consent of parties. Since the accused has the constitutional right 'to meet the witnesses against him face to face,' it is clear that neither the courts nor the legislature could authorize such examination of witnesses against him on motion of the solicitor for the state without his consent. Perhaps, this together with considerations of the danger of perjured testimony, the improbability of securing prompt action, and the opportunity for delay such mode of examination of witnesses abroad would afford to parties charged with crime, accounts for the failure of the legislature to provide for examination of witnesses beyond the limits of the state in behalf of the accused. Such examination must depend upon the consent of parties, and the solicitor and not the court represents the state in the matter. We know of no power which the court has to compel the solicitor to consent. It is clear the solicitor would not be subject to punishment for contempt of court if he refused consent. A compelled consent is no consent at all. The power to compel consent could only mean power to dispense with consent. This would lodge the right of consent in this matter in the court and not in the solicitor. The court has power to continue a case from time to time to allow opportunity to procure the attendance of witnesses who may be out of the state in behalf of the accused. The exercise of this power might have effect to induce the solicitor to make choice between a continuance of the case from time to time and a consent to the taking of the deposition of defendant's witness out of the state. But this power would not be exercised for this purpose except upon a strong showing that justice could not be otherwise subserved."<sup>382</sup>

§ 1196. **Letters rogatory.**—Another kind of deposition is by letters rogatory. By this is meant "a formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use

<sup>382</sup> State v. Murphy, 48 S. Car. 1, 25 S. E. 43.

in the pending action. This process was also in use at an early period between the several states of the Union. The request rests entirely upon the comity of courts towards each other.”<sup>363</sup> There is a difference between such a deposition and a deposition taken upon a commission. This difference was discussed in a case in the following language: “There is a very broad distinction between the execution of a commission and the procuring of testimony by the instrumentality of letters rogatory or letters requisitory as they are sometimes called. In the former case the rules of procedure are established by the court issuing the commission and are entirely under its control. In the latter the methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice. We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations and which, if granted, is altogether *ex gratia*.”<sup>364</sup> The United States statutes make provisions as to letters rogatory;<sup>365</sup> and it has been held by a federal court that depositions under letters rogatory are not subject to the strict rules of taking depositions that apply in other cases.<sup>366</sup>

**§ 1197. Depositions to perpetuate testimony or depositions in perpetuam memoriam rei.**—Depositions in *perpetuam memoriam rei* are depositions taken, as the term indicates, to perpetuate or preserve the testimony of a witness for use in an anticipated suit and not in a pending suit as in the case of the ordinary deposition. Formerly these depositions could be taken only in or through a court of equity. Today the matter is regulated by statute in most of the states. The different states have different statutes. These statutes commonly provide that whenever any person shall make affidavit before any circuit or superior court or county court or judge thereof or clerk of the court, that such person expects to be made a party in an action thereafter to be commenced, and that the testimony of

<sup>363</sup> Black Law Dict. A form will be found in *Shannon Mfg. Co. v. George W. McCauley & Son Co.* (Del.), 56 Atl. 367.

<sup>364</sup> *Kuehling v. Leberman*, 9 Phila. (Pa.) 163. See, also, *Union Square Bank v. Reichmann*, 9 N. Y. App. Div. 596.

<sup>365</sup> See U. S. Stat. § 875; see, also, 19 U. S. Stat. § 241.

<sup>366</sup> *Nelson v. United States*, 1 Pet. C. C. (U. S.) 235, Fed. Cas. No. 10116. A form is given in the former report and one is also given in 56 Atl. 367.

the affiant or any other person, whether residing within or out of the state to be named in the affidavit, is material and necessary to the prosecution or defense thereof, the court or officer before whom the affidavit is made shall order reasonable notice to be given to the party expected to be adverse to the applicant or his attorney, that on the day and at the place in such notice to be expressed the witness will be examined conditionally before such officer as shall be specified in the order. Then it is generally provided that upon proof that the notice has been given, being made to the officer authorized to take testimony, such officer shall proceed to take and certify and seal up and return the depositions according to the rules provided for other depositions. Within thirty days, or some specified time, after the deposition is taken it shall be filed in the office of the clerk of the proper court of the county where the subject matter of such expected suit may be situated. The clerk then files the deposition, and at any time, either before or after the commencement of the action in anticipation of which such deposition may have been taken, it may be published by order of the court in the offices of whose clerk the same may be filed, on motion of any person or party interested in the preservation of the testimony. It is also frequently provided that such deposition shall be entered of record in the order book of such court, and that when this is done the record and properly authenticated copies of such record may be used as evidence whenever and wherever the original deposition might be used. The statutes provide as to when such depositions may be used. They generally provide that upon proof of the death, insanity or absence from the state of such witness, or inability by reason of age or infirmity to attend, the deposition, or a certified copy thereof by the clerk of the court where the same is filed, shall be admitted as evidence in any court in the state in any cause between the parties named in the affidavit or in any cause between persons claiming under either of said parties, and shall have like effect as if the witness had been personally present and given oral testimony therein, saving, however, the right of exceptions in all cases on account of the incompetency of the witness or of any part of the testimony contained in the deposition.<sup>366</sup> Thus, a grantee who fears difficulty in the future in establishing the execution of his deed may have such a deposition taken.<sup>367</sup> It is held that such depositions cannot be

<sup>366</sup> See Articles in 25 Cent. Law Jour. 242; 27 Cent. Law Jour. 495.

<sup>367</sup> *Caldwell v. Head*, 17 Mo. 561.

made use of when a suit has been commenced before the depositions were taken.<sup>368</sup> An exception, however, is sometimes made in case of the death of the witness,<sup>369</sup> and it has been held that a deposition may be taken in the ordinary manner while a cause is pending upon appeal, although its purpose is to preserve testimony.<sup>370</sup>

**§ 1198. Depositions to perpetuate testimony—Under federal statute.**—In the United States courts application may be made to the circuit court as a court of equity according to the usages of chancery, to take depositions relating to any matter that may be cognizable in any court in the United States.<sup>371</sup> But it has been held such a deposition cannot be taken *ex parte* by a proceeding in equity without any service of process upon the defendants in interest even though they are out of the country.<sup>372</sup> And the rule for the admission of such depositions is stated as follows: "Any court of the United States may admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in the court of the state wherein such cause is pending according to the laws thereof."<sup>373</sup>

**§ 1199. Depositions by interrogatories.**—Some states have special statutes concerning the taking of depositions by written interrogatories. Such statutes commonly provide that the party desiring to take such deposition shall serve notice of his intention together with a copy of the interrogatories which he intends to propound. The opposite party may file with the clerk within five days or some specified time such cross-interrogatories as he desires to propound. The clerk shall then issue to some officer authorized to take depositions a commission with the interrogatories, cross-interrogatories and re-examining interrogatories annexed thereto, requiring him to cause the witness to come before him at such time and place as he may appoint, and faithfully to take his deposition upon the

<sup>368</sup> *Greenfield v. Cushman*, 16 Mass. 393.

<sup>369</sup> *Dearborn v. Dearborn*, 10 N. H. 473; *Paton v. Westervelt*, 5 How. Pr. (N. Y.) 399. See, also, *McClaskey v. Barr*, 47 Fed. 154.

<sup>370</sup> *Long v. Straus*, 124 Ind. 84, 24 N. E. 664. But see *McCall v. Sun Mut. Ins. Co.* 34 N. Y. Super. Ct. 310.

<sup>371</sup> R. S. U. S. § 866.

<sup>472</sup> *Green v. Compagnie Generale*, 82 Fed. 491.

<sup>373</sup> *Gould v. Gould*, 3 Story (U. S.) C. C. 516. See, also, *McClaskey v. Barr*, 47 Fed. 154. But compare *Seeley v. Kansas City Star Co.* 71 Fed. 554.



questions annexed to the commission, and thereupon to make return to the court of his doings under such commission without delay. That the officer shall first swear or affirm the witness that he will make a true, full and perfect answer to the interrogatories to be propounded to him; and then he shall propound the interrogatories annexed to the commission in their order and accurately write the answers of the witness to such and then the witness shall sign it. That neither the parties, their agents or attorneys shall be present, nor shall they nor any of them be informed of the nature of the evidence until the deposition is finished.<sup>374</sup> There is the further provision that the officer shall annex to the deposition his certificate, showing specifically a fulfillment of each requirement of the statute, and shall then inclose the deposition with the commission, interrogatories and answers securely sealed, and transmit the same to the clerk of the court. It is also provided in some of the statutes that if the party served with notice shall prefer to cross-examine the witness orally, he shall notify the opposite party of such election. Where depositions are taken by interrogatories upon commission under a *dedimus potestatem* interrogatories and cross-interrogatories are usually filed and served and their propriety and materiality settled as far as possible before the commission issues,<sup>375</sup> and objections are frequently required to be made at that time or before the commission is sent.<sup>376</sup> But this does not seem to be contemplated by some statutes of the kind above referred to.

**§ 1200. Depositions of parties.**—By statute in some jurisdictions one party may take the deposition of the adverse party, this proceeding taking the place of the equitable bill of discovery.<sup>377</sup> So since interest is no longer a disqualification in most jurisdictions

<sup>374</sup> The mere presence of the attorney of a party at the taking of a deposition under such a statute has been held to be sufficient cause for rejecting it. *Hollister v. Hollister*, 6 Pa. St. 449.

<sup>375</sup> *Cocker v. Franklin Hemp, & Co.* 1 Story (U. S.) C. C. 169; *MacDonald v. Garrison*, 2 Hilt. (N. Y.) 565; 2 *Desty Fed. Proc.* § 385.

<sup>376</sup> *Potter v. Leeds*, 1 Pick. (Mass.) 309; *Adams v. Wadleigh*, 10 Gray (Mass.) 360; *Brewer v. Press Pub.*

*Co.* 20 Misc. (N. Y.) 509; *Dent v. Society, &c.* 62 Hun (N. Y.) 620, 16 N. Y. S. 684; *Cocker v. Franklin Hemp, &c.* 1 Story (U. S.) C. C. 169.

<sup>377</sup> *Branch Bank v. Parker*, 5 Ala. 731; *Meier v. Paulus*, 70 Wis. 165, 35 N. W. 301; *Ewbank Ind. Tr. Ev.* §§ 192, 224, 225; 1 *Elliott's Gen. Pr.* § 414. See "Discovery," Chapter LV, where this subject is fully considered.

and parties are generally competent to testify in their own behalf, they may generally have their own depositions taken in the same manner and under the same rules as the depositions of other witnesses are taken.<sup>378</sup> In Ohio, where a party desires to take his own deposition in his own behalf the notice should so specify,<sup>379</sup> but where a party's deposition was taken on his own behalf on a notice which did not so state, it was held that there was no available error in admitting it in evidence when no exception was taken before the trial.<sup>380</sup> So where a party's deposition was properly taken and filed, and he died before the trial, the deposition was held admissible.<sup>381</sup> And even though a party whose deposition has been taken and filed is present and testifies, the deposition may, at the proper time, be used for the purpose of impeaching him.<sup>382</sup>

<sup>378</sup> *Abshire v. Mather*, 27 Ind. 381;  
*Bourgette v. Hubinger*, 30 Ind. 296.

<sup>379</sup> *Brown v. Raft of Timber*, 1 H.  
13.

<sup>380</sup> *Crosby v. Hill*, 39 Ohio St. 100.

<sup>381</sup> *Meador v. Root*, 11 Ohio C. C.  
81.

<sup>382</sup> *National Ben. Asso. v. Harding*, 7 Ohio C. C. 438.

## CHAPTER LV.

### DISCOVERY.

Sec.		Sec.	
1201.	Meaning of term—Scope of chapter.	1210.	Interrogatories to parties.
1202.	Discovery under statutes.	1211.	What interrogatories are proper.
1203.	Effect of discovery under statutes upon equitable discovery.	1212.—	What interrogatories are proper—Continued.
1204.	Statute must be followed—Adverse party—Corporations.	1213.	Compelling answers to be given.
1205.	When remedy allowed.	1214.	Continuance to obtain answers.
1206.	Grounds for discovery.	1215.	Nature of answers required.
1207.	What may be inquired into.	1216.	Use of answers as evidence.
1208.	Attendance enforced.	1217.	Whether state practice is followed in federal courts.
1209.	The examination and its use on the trial.	1218.	Miscellaneous.

§ 1201. **Meaning of term—Scope of chapter.**—By discovery is meant the disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a cause or action pending or to be brought in another court, or as evidence of his rights or title in such proceeding. By a bill of discovery in equity pleading is meant a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, but seeking no relief in consequence of the discovery, though it may pray for a stay of proceedings at law till the discovery is made.<sup>1</sup>

<sup>1</sup> Black Law Dict.

It is the purpose in this chapter, however, to treat only of discovery under the statutes by means of interrogatories filed with the pleadings, or at the time pleadings may be filed, and by means of the oral examination of the adverse party before trial. No attempt will be made to consider the subject of the inspection and production of documents, or the like, nor of the subject of physical examination and inspection of persons or articles, as these subjects will be hereafter treated in separate chapters.

§ 1202. **Discovery under statutes.**—The right to compel discovery formerly existed only in the courts of equity, and this was one of the infirmities of the procedure in common law courts. By statute today most jurisdictions allow discovery. The statute which is most common provides that a party to an action may be examined as a witness concerning any matter stated in the pleading, at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify conditionally or upon commission. And the examination may be had at any time before the trial, before any officer authorized to take depositions, on a previous notice to the party to be examined, and any other adverse party, of at least five days, or some other specified time, unless, for good cause shown, the court shall order otherwise.<sup>2</sup> Some of these provisions are omitted from some of the statutes, while in other jurisdictions other provisions are added. For this reason it would be imprudent to set out all the details of all the statutes. The statute above shows the common provisions.

The statutes in some jurisdictions also provide that parties to actions may be examined before the trial upon written interrogatories.<sup>3</sup> In some jurisdictions this method of obtaining discovery by interrogatories is the only mode of discovery provided by statute, while in other jurisdictions it is an additional mode to the one set out above in the common statute.

<sup>2</sup> It has been held that such a statute does not require that an order or leave of court should first be obtained. *Vann v. Lawrence*, 111 N. Car. 32, 15 S. E. 1031. But in some jurisdictions an order of court must first be obtained, and, in some an affidavit is required.

In some jurisdictions the matter is one of right and in others it is largely, if not entirely, in the discretion of the court.

<sup>3</sup> *Blossom v. Ludington*, 32 Wis. 212. See section *infra* on Interrogatories, post § 1210.

§ 1203. **Effect of discovery under statute upon equitable discovery.**—Statutes authorizing the examination of the adverse party before trial are regarded in most jurisdictions as a substitute for the old bill of discovery, which is expressly abolished in many of them, and for this reason it is sometimes said that an order for examination should be made, as a general rule, only in cases and upon grounds on which a discovery might have been obtained in equity.<sup>4</sup> Under many of the statutes, however, the right of discovery, in one or the other of the modes provided for, extends to all cases in which one party has the right to use the depositions of the opposite party,<sup>5</sup> and interrogatories that could not have been put in a bill of discovery are sometimes proper.

In some jurisdictions the statutes are held to give the common law courts the same powers in relation to discovery that belong to courts of equity,<sup>6</sup> and in some, even where the old bill of discovery is not expressly abolished, it is held that these statutory substitutes practically abrogate it as a separate proceeding.<sup>7</sup> The remedy or proceeding provided by statute is generally held to be auxiliary to a suit, and not as an independent remedy, disconnected from a regular suit,<sup>8</sup> but in a few jurisdictions provision is made for such an examination in advance of an expected suit.

In Minnesota, however, it is held that the adverse party cannot be required to answer written interrogatories prepared by the other party for that purpose, and that the only means that the statute has provided to compel disclosures by the opposite party, in lieu of the means which the system of pleading in the former court of chancery afforded by interrogatories appended to the bill or answer, are by verifying the pleadings, and thus compelling the opposite party to answer or reply

<sup>4</sup> *Beach v. City of New York*, 4 Abb. N. Cas. (N. Y.) 236. See, also, *Devore v. Dinsmore*, 2 Ohio Dec. 600; 1 *Pomeroy Eq. Jur.* § 194; *Baker v. Carpenter*, 127 Mass. 226; *Downie v. Nettleton*, 61 Conn. 593; *Goodwin v. Wood*, 5 Ala. 152.

<sup>5</sup> *Templeton v. Morgan*, 2 Ohio Dec. 602. See, also, *Globe Rolling Mill v. King*, 2 Ohio, 21; *Grant v. Times-Star Co.* 9 Ohio Dec. 619; *Roberts v. Briscoe*, 44 Ohio St. 596; *Herbage v. City of Utica*, 109 N. Y. 81; *Kelly v. Chicago, &c. R. Co.* 60 Wis. 480; *Gunn v. New York,*

*&c. Co.* 171 Mass. 417, 50 N. E. 1031, 1032.

<sup>6</sup> *Field v. Pope*, 5 Ark. 66.

<sup>7</sup> See *Wright v. Superior Court* (Cal.) 57 Cent. Law Jour. 209, where the conflicting authorities are cited in the dissenting opinion and note. See, also, note in 24 L. R. A. 183, and *Reynolds v. Burgess, &c. Co.* 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949; note in 41 Am. St. 389.

<sup>8</sup> See statutes referred to in 2 Am. & Eng. Enc'y of Law (1st ed.) 206, 207; also *Cronin v. Gay*, 20 Tex. 460.

to it under oath, to compel him to exhibit books, papers and documents, and to appear and testify as a witness.<sup>9</sup>

**§ 1204. Statute must be followed—Adverse party—Corporations.**

The courts have no inherent common law right to compel such an examination, and, where the statute creates such a right, and provides how it shall be exercised, the statute must be substantially followed.<sup>10</sup> The statutes usually give the right to examine the adverse party so; and the question has several times arisen as to what is meant by this term and who are included. Ordinarily, only a party to the record can be compelled to make discovery in this manner, and mere interest in the result is insufficient.<sup>11</sup> Thus, it has been held that officers of a corporation cannot be compelled to submit to such an examination where they are not parties,<sup>12</sup> unless they are clearly included; but many statutes expressly provide that they shall make discovery by means of interrogatories, if not by oral examination. So it has been held that the deposition of one co-defendant cannot be so taken and used against another.<sup>13</sup> But, where the action is brought for the benefit of a third person, the nominal party may be examined,<sup>14</sup> and sureties,<sup>15</sup> who are parties and beneficiaries of a trust deed,<sup>16</sup> have also been held to be within the statute.

**§ 1205. When remedy allowed.**—It is not always essential that the matter sought to be discovered should rest in the exclusive knowledge of the party required to answer, or that it be shown that the matter cannot be proved by other witnesses.<sup>17</sup> In fact, it has been held no objection to the granting of an order for the examination that the matter desired to be proved could be established by other witnesses.<sup>18</sup> Yet, if it appears that the facts desired are well known to

<sup>9</sup> *Lenthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503. See, also, *Musick v. Ray*, 3 Metc. (60 Ky.) 427.

<sup>10</sup> *Heishon v. Knickerbocker Life Ins. Co.* 77 N. Y. 278; *First Nat. Bank v. Wood*, 26 Wis. 500.

<sup>11</sup> *Seeley v. Clark*, 78 N. Y. 221.

<sup>12</sup> *Gulf, &c. R. Co. v. White*, 10 Tex. Civ. App. 179, 32 S. W. 322; *Boorman v. Atlantic R. Co.* 78 N. Y. 599; *People v. Mutual Gas Co.* 74 N. Y. 434. But see *Holt v. Southern, &c.* 116 N. Car. 480. See, also, *McCreery v. Bay Circuit Judge*, 93 Mich. 463, 53 N. W. 613.

<sup>13</sup> *Bizzell v. Hill* (Tex. Civ. App.), 37 S. W. 178.

<sup>14</sup> *Harding v. Merrill*, 136 Mass. 291.

<sup>15</sup> *State v. Baetz*, 86 Wis. 29, 56 N. W. 329.

<sup>16</sup> *West Mich. Furniture Co. v. Lacy* (Tex. Civ. App.), 34 S. W. 167. See, also, *Willis v. Baddeley*, 2 (1892) Q. B. 324.

<sup>17</sup> *Alston v. Graves*, 6 Ala. 174.

<sup>18</sup> *Videtto v. Dudley*, 4 N. Y. S. 437.

the applicant, or are matters of record, the application, it has been held, should be refused,<sup>19</sup> and, under some statutes, an order for such an examination has been refused where the information can be readily obtained and used without such examination.<sup>20</sup>

The remedy has been allowed in an action to recover property fraudulently obtained,<sup>21</sup> and in an action for an accounting.<sup>22</sup> But, under certain statutes, it has been held that the remedy was intended for suits originating in courts of record, and not for those brought by appeal from a justice's court.<sup>23</sup> And such statutes, it is held, do not apply to the examination of a co-defendant.<sup>24</sup> It has also been held that an order for a second examination of a party before trial will be granted only upon a showing of special facts justifying it,<sup>25</sup> and is discretionary with the court.<sup>26</sup>

**§ 1206. Grounds for discovery.**—The grounds for granting an order for discovery depend largely upon the statute of the particular jurisdiction.<sup>27</sup> It is frequently held that it should be allowed to enable one to secure evidence in support of his cause of action or defense, and not merely for convenience.<sup>28</sup> It has been held that a defendant, who is connected with a firm against which plaintiff has a demand, may be examined before trial in regard to its composition, in order to ascertain the proper parties defendant to substitute for those designated as John Doe.<sup>29</sup> It has also been held that, wherever it appears that the examination of the adverse party before trial is

<sup>19</sup> *Cross v. National Fire Ins. Co.* 53 Hun (N. Y.) 632.

<sup>20</sup> *Tannebaum v. Lippmann*, 85 N. Y. S. 122.

<sup>21</sup> *Davenport Glucose Mfg. Co. v. Taussig*, 33 Hun (N. Y.) 32.

<sup>22</sup> *Valentine v. Harbeck*, 6 N. Y. S. 572.

<sup>23</sup> *Atwood v. Reyburn*, 5 Mo. 555.

<sup>24</sup> *Roberts v. Thompson*, 3 How. Prac. (N. Y.) 321; *Brizzell v. Hill* (Tex. Civ. App.), 37 S. W. 178.

<sup>25</sup> *Dambmann v. Butterfield*, 15 Hun (N. Y.) 495.

<sup>26</sup> *Hancock v. Franklin Ins. Co.* 107 Mass. 113.

<sup>27</sup> Under some of the statutes the examination may extend to any relevant matter, even though it relates to the cause of action or de-

fense of the other party, while, under others, it is limited to matters necessary to support the case or defense of the applicant.

<sup>28</sup> *McVickar v. Ketchum*, 1 Abb. Prac. (N. S.) 452. Mere "fishing" questions which are not relevant to the case, or are immaterial, impertinent and annoying, are not ordinarily allowed. *Jenkins v. Putnam*, 106 N. Y. 272; *Wabash R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661.

<sup>29</sup> *Baas v. Pain*, 71 Hun (N. Y.) 612, 24 N. Y. S. 583; affirmed in 139 N. Y. 623, 35 N. E. 206. See, also, *Clark v. Wicklow*, 27 N. Y. S. 43. But compare *In re Singer*, 82 N. Y. S. 870.

material and necessary, and that the application therefor is made in good faith, and not for the purpose of improperly extracting evidence from him, an order for examination is granted almost as a matter of course.<sup>30</sup> A discovery has been allowed to enable the plaintiff to ascertain the amount for which he should demand judgment,<sup>31</sup> and to compel counsel to answer if he has a deed in his possession which has surreptitiously disappeared.<sup>32</sup>

It has also been held that a plaintiff may, in an action at law in a federal court, obtain an order for the examination of the defendant, to enable the plaintiff to frame his complaint, where such an order is provided for by the state Code of Procedure.<sup>33</sup> But it has been held in the federal court that a bill of discovery will not be allowed where the only object of taking the deposition of a defendant appears to be to ascertain what he will swear to before placing him on the witness stand in court, especially where no answer has been filed, and the answer is not yet due.<sup>34</sup>

A discovery has been refused in the following miscellaneous cases: Where the purpose of the examination is to ascertain whether a cause of action exists against the party sought to be examined;<sup>35</sup> to assist plaintiff in determining which of two causes of action he has;<sup>36</sup> to ascertain in advance what his adversary's testimony will be, and not for the purpose of using the same as evidence;<sup>37</sup> where the object is not to get the testimony to use on the trial, but to force the party, by such examination, to furnish information to enable his adversary to look up witnesses to use against him.<sup>38</sup> It has also been held, in an action for libel, that the defendant cannot procure an examination of plaintiff before trial, for the purpose of preparing a plea in justification, as such plea can only employ facts known and believed at the time of the alleged libel;<sup>39</sup> and that an examination before trial is not allowed in

<sup>30</sup> Hardy v. Peters, 30 Hun (N. Y.) 79.

<sup>31</sup> Hofman v. Seixas, 12 Misc. 3, 33 N. Y. S. 23.

<sup>32</sup> Morgan v. Jones, 24 Ga. 155.

<sup>33</sup> Anderson v. Mackay, 46 Fed. 105. But see post § 1217, as to whether the state practice as to interrogatories obtains in the federal courts.

<sup>34</sup> Turner v. Shackman, 27 Fed. 183.

<sup>35</sup> Brynes v. Ladew, 15 Misc.

413, 36 N. Y. S. 1048; Britton v. Macdonald, 23 N. Y. S. 350; Nathan v. Whitehill, 67 Hun (N. Y.) 398, 22 N. Y. S. 63.

<sup>36</sup> Greene v. Carey, 81 Hun (N. Y.) 496, 31 N. Y. S. 8.

<sup>37</sup> In re Davis, 38 Kans. 408, 16 Pac. 790; Bird v. Kreiser, 27 N. Y. S. 1425.

<sup>38</sup> Beach v. City of New York, 4 Abb. N. Cas. (N. Y.) 236.

<sup>39</sup> Miller v. Brooks, 20 N. Y. S.



order to enable the adverse party to find out whether he has a cause of action against other persons not parties.<sup>40</sup> So, where the affidavit of a defendant shows that his answer will be a general denial, it has been held that an order for the examination of the plaintiff before trial, in order to enable defendant to prepare his answer and prove his defense, should not be granted.<sup>41</sup>

**§ 1207. What may be inquired into.**—The subject of this section, as to what may be inquired into, is closely connected with the preceding section on the grounds for taking the deposition. Among some of the miscellaneous matters that may be inquired into, in a proper case, are matters in order to prove that the defendants were co-partners,<sup>42</sup> concerning the wrongful withdrawal of money from the firm by one partner,<sup>43</sup> and to prove a parol agreement to pay interest.<sup>44</sup> So, the maker of a note has a right to show by interrogatories that the holder is not the true owner, but suing colorably for one against whom there is an equitable defense.<sup>45</sup> It has been held that a plaintiff at law is bound to make discovery, although his answer may subject him to the loss of legal interest.<sup>46</sup>

But it has been held that a party may refuse to answer interrogatories as to whether a note was a forgery on the ground that he is not compelled to criminate himself;<sup>47</sup> that he is not bound to answer questions concerning matters not stated in the pleading;<sup>48</sup> that the defendant has no right to a discovery by interrogatories where the pleadings constitute no defense to an action,<sup>49</sup> and that no person can be compelled to answer interrogatories which would subject him to a penalty or forfeiture, or punishment for crime.<sup>50</sup> And a party cannot be required, in answer to interrogatories filed with a pleading, to state

359; *Gray v. Baker*, 23 N. Y. S. 387, affirmed in 140 N. Y. 636, 35 N. E. 892.

<sup>40</sup> *Ziegler v. Lamb*, 5 App. Div. (N. Y.) 47, 40 N. Y. S. 65.

<sup>41</sup> *Immig v. Haesloop*, 14 N. Y. S. 638.

<sup>42</sup> *Goldberg v. Roberts*, 12 Daly (N. Y.) 337.

<sup>43</sup> *Davies v. Fish*, 35 Hun (N. Y.) 430.

<sup>44</sup> *Cox v. Mitchell*, 7 La. 520.

<sup>45</sup> *Phillips v. Carr*, 13 La. 71.

<sup>46</sup> *Taylor v. Matchell*, 2 Miss. (1 How.) 596.

<sup>47</sup> *Parr v. Johnston*, 15 Tex. 294.

<sup>48</sup> *Chaffin v. Brownfield*, 88 Ind. 305.

<sup>49</sup> *Lamson v. Falls*, 6 Ind. 309.

<sup>50</sup> *Marshall v. Riley*, 7 Ga. 367; *French v. Vermeman*, 14 Ind. 282; *Franks v. Reimer*, 9 N. Y. S. 273; *Roberts v. Western Ins. Co.* 40 Ill. App. 428. But disclosure of fraud may usually be compelled. *Mitchell v. Koecker*, 11 Beav. (N. Car.) 380; *Skinner v. Judson*, 8 Conn. 528; 1 *Pomeroy Eq. Jur.* § 202.

conclusions of law, answer hypothetical questions, or give opinions, or to set out copies of instruments; and interrogatories calling for such matters may properly be stricken out.<sup>51</sup>

Under some statutes a defendant is bound to answer interrogatories as to such matters only as tend to support the plaintiff's claim, and not as to matters which relate exclusively to his own defense;<sup>52</sup> so a party cannot be compelled to answer in a deposition questions tending to discover the names of his witnesses, and the manner of proving his case.<sup>53</sup> And an order will not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet it,<sup>54</sup> nor merely to enable a party to find out what evidence his adversary will introduce to support his case.<sup>55</sup> It is also sometimes held necessary to show that the answers of the adverse party will be material evidence in the case.<sup>56</sup>

**§ 1208. Attendance enforced.**—It is generally provided in the statutes that the attendance of the party to be examined may be enforced, and that any party refusing to attend and testify may be punished as for a contempt. It is also often provided, as a further penalty for non-attendance, that the party may have his complaint, answer or reply stricken out. But it is provided in some of the state statutes that the party to be examined before trial shall not be compelled to attend in any other county than that of his residence.

A party who is in default for failure to answer interrogatories cannot complain that no steps were taken to compel an answer to his pleading until the case was called for trial.<sup>57</sup> It has been held in Indiana that, before any penalty can properly be inflicted for refusal to attend and be examined, it must appear that he was duly served with a summons issued by the court, or by an officer having authority to take depositions,<sup>58</sup> and that the other adverse parties were duly notified, if the party to be examined had any co-parties.<sup>59</sup> The mere

<sup>51</sup> *Meyer v. Manhattan Life Ins. Co.* 144 Ind. 439, 43 N. E. 448.

<sup>52</sup> *Wetherbee v. Winchester*, 128 Mass. 293.

<sup>53</sup> *Eaton v. Farmer*, 46 N. H. 200.

<sup>54</sup> *Chapin v. Thompson*, 16 Hun (N. Y.) 53.

<sup>55</sup> *Shepmoes v. Bowsson*, 52 How. Prac. 401, 1 Abb. N. C. 481.

<sup>56</sup> *Marshall v. Riley*, 7 Ga. 367; *Hart v. American Cotton Co.* 84

N. Y. S. 1065. See, also, *State v. Continental Tobacco Co.* 177 Mo. 1, 75 S. W. 737.

<sup>57</sup> *Hubler v. Pullen*, 9 Ind. 273.

<sup>58</sup> *Bish v. Beatty*, 111 Ind. 403; *White v. D. S. Morgan & Co.* 119 Ind. 338, 21 N. E. 968.

<sup>59</sup> *Smith v. Smith*, 80 Ind. 267; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951.

service upon the party to be examined of notice of an intention to take his examination is not enough. It must also generally appear that the complaining party attended at the time and place mentioned in the notice, and desired and was ready to examine his adversary concerning some matters stated in the pleadings, or it may be presumed that he was not harmed by the latter's failure to attend.<sup>60</sup> It is, in general, only a willful refusal to attend and testify that is to be punished by striking out the pleadings of the party refusing, and this penalty should not be inflicted when a good excuse for failing to obey the notice and summons is shown,<sup>61</sup> nor where the party does attend and testify, but merely refuses to answer certain questions until the opinion of the court can be taken as to whether they are so material and relevant to the issues that he ought to be required to answer them;<sup>62</sup> nor is the court authorized to strike out the pleadings of a party who merely refuses to answer improper questions.<sup>63</sup> So, where the refusal to answer was clearly erroneous, but the offending party, by affidavit, purged himself of the seeming contempt by showing that the refusal was under an honest belief, in good faith, that he was acting within his legal rights, and by offering to obey the order of the court in that regard, it was held that a motion to strike out his pleading should be overruled.<sup>64</sup> But, in case the parties were duly notified and properly summoned, and all statutory steps were taken, and the refusal to submit to an examination was without sufficient excuse, the court, upon striking out the pleadings of the offending party, may proceed to render judgment against him as upon a default and confession of the matters alleged by his adversary.<sup>65</sup>

**§ 1209. The examination and its use on the trial.**—It is often provided that the examination shall be taken and filed as a deposition in the cause, and may be read by the party taking it at his option. This does not require the party who takes it to use it,<sup>66</sup> but it has been held that it makes the deposition one of the papers in the case belonging

<sup>60</sup> *Bish v. Beatty*, 111 Ind. 403, 406.

<sup>61</sup> *Huffman v. Copeland*, 86 Ind. 224; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951.

<sup>62</sup> *Chaffin v. Brownfield*, 88 Ind. 305.

<sup>63</sup> *Chaffin v. Brownfield*, 88 Ind. 305; *Wabash, &c. R. Co. v. Mor-*

*gan*, 132 Ind. 430, 437, 31 N. E. 661.

<sup>64</sup> *Chaffin v. Brownfield*, 88 Ind. 307.

<sup>65</sup> *Belton v. Smith*, 45 Ind. 291; *Reed v. Spayde*, 56 Ind. 394; *Nelson v. Neely*, 63 Ind. 194; *Trippe v. Carr*, 80 Ind. 371.

<sup>66</sup> *Shober v. Wheeler*, 113 N. Car. 370, 18 S. E. 328.

to the files of the court;<sup>67</sup> that the party who caused it to be taken has no right to take it away and conceal it until the day of the trial, and that, if he does so, it is error for the court to refuse, on proper application, to order it returned to the files of the court for the inspection and use of all the parties under such reasonable restrictions as the court in its discretion may prescribe.<sup>68</sup> In Indiana, the examination must be confined to matters stated in the pleadings, and a party may refuse to answer any questions as irrelevant and impertinent which do not relate to such matters;<sup>69</sup> and, if the examination is taken before an answer is filed, it must relate solely to the matters stated in the complaint.<sup>70</sup> A party cannot, under most of the statutes, be required to go beyond the facts concerning which he might be examined as a witness in court. He cannot be compelled to give the names of the witnesses by which he expects to make out his case, and the facts to which he expects each of them to testify, nor, it has been held, to relate any facts of which he does not have personal knowledge.<sup>71</sup> The party examined may be cross-examined by his own counsel, and the cross-examination is admissible in evidence along with the examination in chief, if the latter is used at the trial.<sup>72</sup> The proper practice, it is said, is to put the examination-in-chief, the cross-examination and the re-examination in evidence together, so that it may be seen to what extent one part of the examination controls or modifies the other and the jury may get the testimony of the witness substantially as if he were examined, cross-examined and re-examined in their presence and hearing.<sup>73</sup> It has also been held that a party cannot select certain answers from the deposition and read them to the jury, leaving the remainder unread;<sup>74</sup> but one who uses his adversary's examination as evidence is not bound by the statements therein, and may

<sup>67</sup> *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

<sup>68</sup> *Grant v. Davis*, 5 Ind. App. 116, 31 N. E. 587.

<sup>69</sup> *Chaffin v. Brownsfield*, 88 Ind. 305; *Bish v. Beatty*, 111 Ind. 403; *Wabash, &c. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661. See, also, *Goodwin v. Wood*, 5 Ala. 152; *Roberts v. Keaton*, 21 Ga. 180.

<sup>70</sup> *Chaffin v. Brownsfield*, 88 Ind. 305.

<sup>71</sup> *Wabash, &c. R. Co. v. Morgan*, 132 Ind. 430, 437, 31 N. E. 661.

<sup>72</sup> *Mosier v. Stoll*, 119 Ind. 244, 20 (N. E.) 752; *Crocker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169.

<sup>73</sup> *Crocker v. Agenbroad*, 122 Ind. 585.

<sup>74</sup> *Cook Brewing Co. v. Ball*, 22 Ind. App. 656, 661. But if a deposition of this kind is not required to be filed, it would seem that it might be used as an admission or for purposes of impeachment, and such has been the practice in some jurisdictions where depositions are not filed. To require all the exam-

rebut them by adverse testimony of himself or other witnesses.<sup>75</sup> The presence of the party at the trial, and his examination as a witness in court, does not affect the admissibility in evidence of his examination, in case the party taking it desires to use it;<sup>76</sup> nor, on the other hand, does his examination before trial prevent the adverse party from requiring him to testify when present at the trial.<sup>77</sup>

§ 1210. **Interrogatories to parties.**—The state statutes generally provide for interrogatories to parties to the action. A common provision is that either party may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath. "The object of discovery," it is said in a recent case,<sup>78</sup> "is to obtain information material to the merits of the case of the party seeking it which is within the control or possession of the opposite party, or to compel admissions in respect to material matters. It tends to avoid expense and delay, and we see no good reason for holding that, when it is sought through interrogatories filed under the statute, it should be granted less freely than in equity, or even that it should be limited to cases in which it would be granted in equity. The fact that the information may be obtained through witnesses does not take away the right of discovery through interrogatories."<sup>79</sup>

ination to be read in all such cases as an unbending rule would seem somewhat unreasonable. *Shober v. Wheeler*, 113 N. Car. 370, 18 S. E. 328.

<sup>75</sup> *Crocker v. Agenbroad*, 122 Ind. 585, 587, 24 N. E. 169.

<sup>76</sup> *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

<sup>77</sup> *Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922; *Smith v. Rosenham*, 19 Ind. 256; *Helms v. Green*, 105 N. Car. 251, 18 Am. St. 893.

<sup>78</sup> *Gunn v. New York, &c. R. Co.* 171 Mass. 417, 50 N. E. 1031.

<sup>79</sup> Citing in support of the last proposition. *Hubbard v. Hubbard*, 6 Gray (Mass.) 362. One object of such statutes, as above intimated, is to secure admissions, in advance of the trial, which may relieve the party securing them from addu-

cing evidence to prove the matters so admitted. *Volusia Co. Bank v. Bigelow* (Fla.), 33 So. 704; *Attorney General v. Gaskill*, L. R. 20 Ch. Div. 519; *Baker v. Carpenter*, 127 Mass. 226. And the purpose of such statutes is not, ordinarily, confined to obtaining admissions or evidence that will necessarily be used upon the trial, but is also to obtain proper information to aid a party in preparing for trial. *Jacksonville, &c. R. Co. v. Peninsular Land, &c. Co.* 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 43; *Baker v. Carpenter*, 127 Mass. 226; *Blossom v. Ludington*, 32 Wis. 212; *Vennilyca v. Fulton Bank*, 1 Paige (N. Y.) 37; *Woolley v. North London R. Co.* L. R. 4 C. P. 602; *Atkinson v. Forbroke*, L. R. 1 Q. B. 628.

It has been held, under such a statute, that proper interrogatories may be filed at any time before the issues close, whether a specific pleading is filed at that particular time or not,<sup>80</sup> provided the party who propounds the interrogatories has a pleading on file which tenders an issue. These interrogatories take the place of a bill of discovery under the former equity practice.<sup>81</sup> It has been held that a defendant cannot require the plaintiff to answer interrogatories propounded before he has filed an answer,<sup>82</sup> and that a plaintiff cannot compel answers to be given to interrogatories filed with a complaint which does not state a cause of action.<sup>83</sup> But a party will not be permitted, without special leave of court, to be granted or withheld by the court in its discretion, to file additional interrogatories after one set of interrogatories have been filed by him and answered. In strictness, all the interrogatories he proposes to file should be filed at one time.<sup>84</sup> The provisions of the Indiana statute as to filing interrogatories apply to all ordinary civil actions, but do not extend to divorce cases.<sup>85</sup> They do extend, however, to claims against decedent's estates, and interrogatories may properly be filed with an answer to such a claim.<sup>86</sup> A corporation, through its proper officers, agent or agents, may, under most statutes, be compelled to answer interrogatories the same as a natural person,<sup>87</sup> and under a statute providing that the president of the corporation may be required to answer, it is held that the corporation cannot shield itself under an avowal of ignorance on his part, and that he must make proper inquiries and answer a proper interrogatory accordingly.<sup>88</sup> Where interrogatories are evidently not filed in good

<sup>80</sup> *Sherman v. Hogland*, 73 Ind. 472; *Cates v. Thayer*, 93 Ind. 156. It has been held that they may be propounded where the matter in controversy is presented by plea in abatement. *Paul v. Baltimore, &c. R. Co.* (Ind. App.) 69 N. E. 1034.

<sup>81</sup> *Jacksonville, &c. R. Co. v. Peninsular Land, &c. Co.* 27 Fla. 157, 9 So. 661, 17 L. R. A. 33; *Barnard v. Flinn*, 8 Ind. 204; *Mason v. Weston*, 29 Ind. 561; *Gunn v. New York, &c. R. Co.* 171 Mass. 417, 50 N. E. 1031, 1032; *Wilson v. Webber*, 2 Gray (Mass.) 558, 561.

<sup>82</sup> *Wheeler v. Reitz*, 92 Ind. 379. See *Smith v. McDonald*, 3 Ind. App. 49, 28 N. E. 994.

<sup>83</sup> *In Matter of Van Walters v. Board, &c.* 132 Ind. 511, 32 N. E. 568.

<sup>84</sup> *Davis v. Davis*, 119 Ind. 511, 21 N. E. 1112.

<sup>85</sup> *Simons v. Simons*, 107 Ind. 197; *Barr v. Barr*, 31 Ind. 240.

<sup>86</sup> *Alexander v. Alexander*, 48 Ind. 559.

<sup>87</sup> *Louisville, &c. R. Co. v. Henley*, 88 Ind. 535. See, also, *Jacksonville, &c. R. Co. v. Peninsular Land, &c. Co.* 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33; *Gunn v. New York, &c. R. Co.* 171 Mass. 417, 50 N. E. 1031.

<sup>88</sup> *Toland v. Paine Furniture Co.* 179 Mass. 501, 61 N. E. 52; *Robbins v. Brockton St. R. Co.* 180 Mass.

faith it has been held proper to reject them as sham pleading.<sup>89</sup> It has also been held to be too late to propound interrogatories at the trial, or after it has commenced, without some showing by affidavit.<sup>90</sup>

§ 1211. **What interrogatories are proper.**—The interrogatories are generally required to be relevant to the matter in controversy,<sup>91</sup> as shown by the pleadings. It has also been held that, if a demurrer is sustained to the pleading with which interrogatories were filed,<sup>92</sup> or such pleading is superseded by filing an amended complaint or answer,<sup>93</sup> both it and the interrogatories are taken out of the record, and answers to the interrogatories cannot afterward be required. As a general rule, under most of the statutes, a party can only be interrogated concerning facts in dispute, and interrogatories which ask about irrelevant matters,<sup>94</sup> or matters about which there is no dispute,<sup>95</sup> or which ask the party to whom they are addressed to state conclusions of law, or the legal effect of a written instrument, to answer hypothetical questions, determine the law upon facts stated, or to set forth copies of written instruments,<sup>96</sup> may be stricken out by the court; but it has been held that a party who answers irrelevant interrogatories, without objection, cannot successfully object to the use of his answers as evidence.<sup>97</sup> The right to interrogate the adverse party, under the statute, is not a right to abridge his right to try any fairly doubtful fact. Still less is it a right to require him to give an opinion on the general issue or merits of the case, or to state his view of it.<sup>98</sup> And there is no right to ask what particular possible witnesses would testify.<sup>99</sup>

51, 61 N. E. 265. See, also, *Glen-gall v. Frazer*, 2 Hare, 99; *Bolckow v. Fisher*, 10 Q. B. Div. 161; *Water Co. v. Quick*, 3 Q. B. Div. 321.

<sup>89</sup> *Key v. Robinson*, 8 Ind. 368.

<sup>90</sup> *Dabbs v. Henken*, 3 Rob. (La.) 123.

<sup>91</sup> *Druley v. Hendricks*, 13 Ind. 478; *Mutual Benefit, &c. Asso. v. Cannon*, 48 Ind. 264.

<sup>92</sup> *Swift v. Ellsworth*, 10 Ind. 205.

<sup>93</sup> *Hill v. Nisbet*, 100 Ind. 341, 349.

<sup>94</sup> *Druley v. Hendricks*, 13 Ind. 478; *Mutual Ben. &c. Asso. v. Cannon*, 48 Ind. 264.

<sup>95</sup> *Stevens v. Flannagan*, 131 Ind. 122, 130, 30 N. E. 898.

<sup>96</sup> *Myer v. Manhattan, &c. Co.* 144 Ind. 439, 445, 43 N. E. 448.

<sup>97</sup> *Cincinnati, &c. R. Co. v. Howard*, 124 Ind. 280; *Combs v. Union Trust Co.* 146 Ind. 688, 693, 46 N. E. 16.

<sup>98</sup> *Robbins v. Brockton St. R. Co.* 180 Mass. 51, 61 N. E. 265. See, also, *Bechewaise v. Railroad Co.* L. R. 6 C. P. 36, 38.

<sup>99</sup> *Robbins v. Brockton St. R. Co.* 180 Mass. 51, 61 N. E. 265. See, also, *Wabash, &c. R. Co. v. Morgan*, 132 Ind. 430.

§ 1212. **What interrogatories are proper—Continued.**—Many of the statutes are based, in the main, upon the English common law procedure act of 1854, and the following rules have been formulated from the decisions under such statute: Such interrogatories are not proper as seek exclusively for the case of the other side; as are of a merely fishing character; as are not reasonably relevant to the issue; as are unnecessary or useless; as seek to establish a forfeiture, strictly so called; as seek to contradict a written instrument; and as are privileged upon grounds of public interest. But interrogatories may be admissible: The answers to which may expose other persons to actions; the answers to which may expose the party interrogated to penalties; where a defendant in ejectment seeks to discover the character in which the plaintiff claims, and the pedigree upon which he relies; that seek secondary evidence of lost written documents; that inquire into confidential communications that the party interrogated would not be privileged from disclosing upon oral examination; that seek to disprove the bona fides of a prima facie defense, or to show that the defendant has acted fraudulently.<sup>100</sup>

A party, however, generally has the same protection against being required to incriminate himself that a witness has, and cannot be compelled to answer any question the answer to which will expose him to a criminal charge or punishment of any kind.<sup>102</sup> Where the record does not disclose that the party made any answer to an interrogatory, he will not be heard, on appeal, to complain of the overruling of his motion to strike it out, although it was improper;<sup>103</sup> and, in one case, where it appeared from the record that an answer to an interrogatory was not required, either to enable the party to better prepare his case, or to adapt his pleadings to the facts of the case, and that all the information which could have been obtained by such an answer was fully supplied by the evidence given at the trial, the error if any, in striking out such interrogatory, was held to be harmless.<sup>104</sup>

§ 1213. **Compelling answers to be given.**—Upon filing interroga-

<sup>100</sup> *Volusia Co. Bank v. Bigelow* (Fla.), 33 So. 704, 705, stating the above substantially as stated in *Day Com. Law Proc.* (4th ed.) 305-309.

<sup>102</sup> *French v. Venneman*, 14 Ind. 282. See, also, *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524,

533; *Thorndyke v. Adkins*, 19 Ga. 464.

<sup>103</sup> *Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786.

<sup>104</sup> *Myer v. Manhattan, &c. Co.* 144 Ind. 439, 43 N. E. 448. But see *Baker v. Carpenter*, 127 Mass. 226; *Gunn v. New York, &c. R. Co.* 171 Mass. 417 50 N. E. 1031.



tories, the party filing them should obtain a rule that they shall be answered within a definite time to be fixed by the court,<sup>105</sup> for, unless the statute otherwise provides, until such a rule is entered the opposite party cannot be deemed to be in default.<sup>106</sup> The authority of the court to enforce answers to proper interrogatories extends to striking out the pleadings of a party who refuses to answer interrogatories as ordered, in the absence of any sufficient excuse shown for his refusal;<sup>107</sup> but, where a mere general rule to answer was obtained, and no particular steps were taken to enforce an answer to the interrogatories by a time certain, it was held that the court properly refused to proceed to extreme measures, such as dismissing the action because the interrogatories were not answered.<sup>108</sup> An error in refusing to require that an interrogatory filed with a pleading shall be answered may be cured by afterward requiring such answer to be filed before the trial,<sup>109</sup> and an error in refusing to strike out interrogatories,<sup>110</sup> and compelling the party to answer them,<sup>111</sup> has been held to be harmless where the answers were not given in evidence. It has also been held that, where some of the interrogatories annexed to an answer are frivolous, the defendant is not entitled to an order that they be generally answered.<sup>112</sup>

It is held in some jurisdictions that, if the plaintiff fails to answer interrogatories propounded to him by the defendant, the court is not required to dismiss his suit, but may either continue the cause until full answers made, or compel an answer by attachment or direct a non-suit.<sup>113</sup> And the failure of the defendant to answer interrogatories will, in some jurisdictions, authorize a judgment by default against him.<sup>114</sup> Some other jurisdictions hold that, if the interrogatories are

<sup>105</sup> *Rice v. Derby*, 7 Ind. 649; *Key v. Robinson*, 8 Ind. 368; *Rielay v. Whitcher*, 18 Ind. 458. But see *Seaman v. Babington*, 11 La. Ann. 173, with which compare *Lapene v. Riche*, 15 La. Ann. 612. Court may extend time. *Goodwin v. Harrison*, 6 Ala. 441.

<sup>106</sup> *Cates v. Thayer*, 93 Ind. 156.

<sup>107</sup> *Fitch v. Citizens' Nat. Bank*, 97 Ind. 211.

<sup>108</sup> *McNamara v. Ellis*, 14 Ind. 516. See, also, *Railroad Co. v. Construction Co.* 49 Ohio St. 681.

<sup>109</sup> *Smith v. McDonald*, 3 Ind. App. 49, 28 N. E. 994.

<sup>110</sup> *Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786.

<sup>111</sup> *Scott v. Smith*, 70 Ind. 298.

<sup>112</sup> *Hogaboom v. Price*, 53 Iowa, 703, 6 N. W. 43.

<sup>113</sup> *Ex parte McLendon*, 33 Ala. 276. See, also, *Harding v. Morrill*, 136 Mass. 231.

<sup>114</sup> *Young v. McLemore*, 3 Ala. 295; *Fels v. Raymond*, 139 Mass. 100; *Harding v. Noyes*, 125 Mass. 572.

not answered, they are taken *pro confesso*.<sup>115</sup> Other courts hold that the pleading of a party may be stricken out for failing to answer interrogatories.<sup>116</sup> If the answers are not manifestly evasive or insufficient it is a harsh penalty to enforce a nonsuit or default, and it ought not, ordinarily, to be done, unless the party asking them first presents the matter to the court for its judgment as to whether they should be made clearer or fuller;<sup>117</sup> but in Louisiana, at least where the answers are manifestly evasive, the courts hold that answering evasively generally has the same effect as not answering at all, and authorizes the interrogatory to be taken as confessed without any application for a further answer.<sup>118</sup> It has also been held that, where the court permits improper interrogatories to be filed, the party may answer them, and object to their admission at the trial.<sup>119</sup>

§ 1214. **Continuance to obtain answers.**—A defendant who propounds pertinent inquiries, supported by a sufficient affidavit, is entitled to have them answered, and to have a continuance of the cause until they are; and, where the adverse party has absented or concealed himself, the defendant cannot be required to show that his testimony can probably be procured in order to obtain a continuance until the answers are given.<sup>120</sup> But the court is not bound to continue the cause until the next day to enable a party to file an affidavit of materiality,<sup>121</sup> and, where no such affidavit has been filed, and it is shown by the affidavit of opposing counsel that his client is a non-resident, and not in attendance at court,<sup>122</sup> or is at a distance from court and knows nothing of the interrogatories,<sup>123</sup> the rule to answer them may be discharged.

§ 1215. **Nature of answers required.**—The interrogatories must be answered positively and without evasion, but the party may, generally, in addition thereto, set forth in his answer all relevant matter in avoidance of the facts stated in the answer, giving such explanation and stating such circumstances as are necessary to a full understand-

<sup>115</sup> *Baine v. Wilson*, 18 La. 59.

<sup>116</sup> *Fitch v. Bank*, 97 Ind. 211.

<sup>117</sup> *Fels v. Raymond*, 139 Mass. 98.

<sup>118</sup> *Whiting v. Ivey*, 3 La. Ann. 649; *Walker v. Wingfield*, 16 La. Ann. 300; *Brander v. Lum*, 11 La. Ann. 217.

<sup>119</sup> *Poindexter v. Davis*, 6 Gratt.

(Va.) 481. But see *Coombs v. Union Trust Co.* 146 Ind. 688, 46 N. E. 16.

<sup>120</sup> *Barnard v. Flinn*, 8 Ind. 204.

<sup>121</sup> *Parish v. Heikes*, 14 Ind. 605.

<sup>122</sup> *Parish v. Heikes*, 14 Ind. 605; *Rielay v. Whitcher*, 18 Ind. 458.

<sup>123</sup> *Cleveland v. Hughes*, 12 Ind. 512.

ing of the matter upon which he is interrogated.<sup>124</sup> Where the party interrogated, answered that he was unable to give a specific statement of certain matters, as where the plaintiff, in an action on a promissory note to which a plea of no consideration had been filed, answered an interrogatory requiring him to state what the consideration of the note was, with the several items constituting it, and their value, by saying that the consideration was goods sold and delivered, but that he could not give the items nor their value, his answer was held sufficient.<sup>125</sup> Where a defendant was interrogated as to whether he held a certain receipt of plaintiff's, it was held that the interrogatory might be answered without making the receipt an exhibit, but that if he made a copy of the receipt an exhibit, with an answer that he held such instrument, a failure to reply under oath must be deemed an admission of the execution of the receipt. It was also held, however, that the receipt might be avoided for fraud or mistake.<sup>126</sup> In another case, an erroneous refusal to require that the answers should be made sufficiently specific was held to be cured by the fact that the party interrogated was sworn as a witness at the trial, and testified fully to the facts sought to be elicited by the interrogatories, which facts had been in that respect pleaded in the answer.<sup>127</sup>

**§ 1216. Use of answers as evidence.**—It is generally provided and held that the answers to interrogatories may be used as evidence on the trial or not, at the option of the party requiring them to be answered. Even where interrogatories have been filed and answered, the party answering them can be compelled by his adversary to attend the trial and submit to a personal examination as a witness,<sup>128</sup> and the fact that he testified as a witness does not make his answers to the interrogatories inadmissible.<sup>129</sup> If used, they may be regarded as admissions of the party under oath and received as primary evidence,<sup>130</sup> and, al-

<sup>124</sup> *Railsback v. Koons*, 18 Ind. 274; *Wright-Blodgett Co. v. Elms*, 106 La. Ann. 150, 30 So. 311.

<sup>125</sup> *Wheelock v. Barney*, 27 Ind. 462.

<sup>126</sup> *Earnhart v. Robertson*, 10 Ind. 8.

<sup>127</sup> *Aylesworth v. Brown*, 31 Ind. 270; *Smith v. McDonald*, 3 Ind. App. 49, 28 N. E. 994. But see *Baker v. Carpenter*, 127 Mass. 226.

<sup>128</sup> *Smith v. Rosenham*, 19 Ind.

256. See, also, *Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922. But compare *Wilmont v. Messerole*, 8 J. & S. (N. Y.) 321.

<sup>129</sup> *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Thompson v. Clay*, 60 Mich. 627.

<sup>130</sup> *Combs v. Union Trust Co.* 146 Ind. 688, 693, 46 N. E. 16. See, also, *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119.

though introduced by the party who asked them, he may, nevertheless, contradict them.<sup>131</sup> The rule that parol evidence is not admissible to prove the contents of documents and other writings, or the facts shown by a decree of court or other public record, does not apply in its strictness to the admissions of a party, and his answers to interrogatories concerning such matters may be read in evidence against him. If a party would avoid the use as evidence of answers to interrogatories, on the ground that the matters inquired about cannot be proved by parol, or are not relevant to the issues, he should present the question by an objection to the interrogatories and a refusal to answer them until the court has passed on the admissibility of the answers.<sup>132</sup>

It has been held that, if an answer is read, the party is required to read the whole of the answer where responsive, but he is not obliged to read a portion not responsive to the interrogatory.<sup>133</sup> And it has also been held that, in order to show an admission on the part of the plaintiff, the defendant can read a part of the deposition without reading the whole.<sup>134</sup>

**§ 1217. Whether state practice is followed in federal courts.**—It was held by the Supreme Court of the United States, a number of years ago, in a well considered case, that the provision of the act of congress of 1872, to the effect that in actions at law in the circuit and district courts of the United States the practice, pleadings and modes of proceeding shall conform as near as may be to those of the state in which the court sits, is applicable only where there is no conflicting rule on the same subject prescribed by act of congress, that a state statute permitting a party to be examined by his adversary as a witness before the trial in an action at law, is in conflict with the act of congress providing that the mode of proof in such actions shall be by oral testimony, and examination of witnesses in open court, except as thereafter otherwise provided, and that the federal court sitting in such state has no power to compel a party to submit to such an examination, nor, after removal, to enforce such an order made by the

<sup>131</sup> *Sawdey v. Spokane, &c. R. Co.* 30 Wash. 349, 70 Pac. 172; *Le Blue v. Sarvie*, 109 La. Ann. 680, 33 So. 729.

<sup>132</sup> *Combs v. Union Trust Co.* 146 Ind. 688, 693, 46 N. E. 16; *Cincinnati, &c. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892. But compare *God-*

*win v. Neustadt*, 42 La. Ann. 735, 7 So. 744; *Rush v. Landers*, 107 La. Ann. 549, 32 So. 95, 57 L. R. A. 353.

<sup>133</sup> *Lake v. Gilchrist*, 7 Ala. 955.

<sup>134</sup> *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789. But see, also, ante § 1209.

state court before the cause was removed.<sup>135</sup> In 1892, however, an act of congress was passed which provides that, in addition to the mode of taking depositions of witnesses in causes pending at law or in equity in the federal courts, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. It is a vexed question as to whether this act authorizes the examination of the adverse party before trial, according to the state practice, either by means of interrogatories and answers or by the taking of his deposition. The weight of authority, as well as the better reason, would seem to be to the effect that it merely provides for additional modes of taking depositions or making the examination in cases already authorized, and does not confer any additional right to examine the adverse party before the trial.<sup>136</sup> But it has been held by several of the courts that the act referred to gives the right to propound interrogatories or take the examination of the adverse party, according to the state practice, whenever the state law so provides.<sup>137</sup>

§ 1218. **Miscellaneous.**—All the adverse parties should be notified of an examination under the statute by deposition, unless the court orders otherwise;<sup>138</sup> and an application to interrogate a party who is absent, after the case is called, comes too late.<sup>139</sup> The party applying for a bill of discovery in a trial at law must use diligence, so as not to unnecessarily delay the trial of the cause.<sup>140</sup> It is held that plaintiff's right to propound interrogatories depends on his capacity to sue,<sup>141</sup> and that an order of examination before trial will not be granted for the examination of an insane person.<sup>142</sup> It has also been held that an error of the court, in refusing to allow an examination

<sup>135</sup> *Ex parte Fisk*, 113 U. S. 713, 7 Sup. Ct. 724.

<sup>136</sup> *Shellabarger v. Oliver*, 64 Fed. 306; *National Cash Register Co. v. Leland*, 77 Fed. 242; affirmed on appeal in 94 Fed. 502; *Despeaux v. Penna. R. Co.* 81 Fed. 897; *Zych v. American, &c. Co.* 127 Fed. 723. See, also, *Texas, &c. R. Co. v. Wilder*, 92 Fed. 953.

<sup>137</sup> *International Tooth Crown Co. v. Hanks' Dental Asso.* 101 Fed. 306; *Smith v. Northern Pac. R. Co.* 110 Fed. 341; *International*

*Tooth Crown Co. v. Carter*, 112 Fed. 396.

<sup>138</sup> *Smith v. Smith*, 80 Ind. 267; *Farrington v. Stone*, 35 Neb. 456, 53 N. W. 389; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951.

<sup>139</sup> *Brooks v. Walker*, 3 La. Ann. 150.

<sup>140</sup> *Dillahunt v. Smith*, 8 Miss. (7 How.) 673.

<sup>141</sup> *Union Bank v. McDonough*, 5 La. 63.

<sup>142</sup> *Mason v. Libbey*, 2 Abb. N. Cas. (N. Y.) 137.

of the adversary before trial, in order to prepare for trial, is not cured by the introduction of, or the opportunity to introduce, evidence on the same point at the trial;<sup>143</sup> and that interrogatories to a bank should be answered by the president, as answers by the cashier alone are insufficient.<sup>144</sup>

A party who has propounded certain interrogatories to his adversary cannot have proper answers stricken out.<sup>145</sup> If interrogatories are not relevant, or do not ask for competent evidence, a motion should be made to strike out or reject them.<sup>146</sup> The objection, unless it exists to the entire series, should be made to specific interrogatories separately, for the fact that some of the interrogatories are improper and objectionable is not ground for striking out or refusing to answer others that are not objectionable.<sup>147</sup> The proper course, it is said, is to answer such as are pertinent and proper and take the judgment of the court on the others.<sup>148</sup> And, where part of one interrogatory may be proper and part is apparently improper, it has been held that the party to whom it is propounded is not bound to take the risk of separating it, and should not be defaulted without an order of court as to the particulars in which his answer is insufficient and an opportunity to amend it.<sup>149</sup> Interrogatories which have been served on the defendant need not bear the signature of the clerk or the seal of the court.<sup>150</sup>

<sup>143</sup> *Baker v. Carpenter*, 127 Mass. 226. But see *Myer v. Manhattan, &c. Co.* 144 Ind. 439, 43 N. E. 448.

<sup>144</sup> *Commercial Bank v. Guice*, 12 Rob. (La.) 181.

<sup>145</sup> *Farrow v. Nashville, &c. R. Co.* 109 Ala. 448, 20 So. 303.

<sup>146</sup> *Combs v. Union Co.* 146 Ind. 688, 46 N. E. 16.

<sup>147</sup> *Dalglish v. Lowther*, L. R. 2

Q. B. Div. (1899) 590; *Volusia Co. Bank v. Bigelow*, 33 So. 704, 705.

<sup>148</sup> *Harding v. Morrill*, 136 Mass. 291.

<sup>149</sup> *Wetherbee v. Winchester*, 128 Mass. 298; *Hare Discov.* (2nd ed.) 105.

<sup>150</sup> *Toomer v. Righton, Riley* (S. Car.) 69. But in most states they must be filed in the cause.

## CHAPTER LVI.

### REAL EVIDENCE.

Sec.		Sec.	
1219.	Meaning of term.	1225.	Models and maps.
1220.	The rule.	1226.	Photographs—In general.
1221.	Development of the law.	1227.	Photographs — Illustrative cases—Where admitted.
1222.	Articles shown to jury in civil cases.	1228.	Photographs —Miscellaneous.
1223.	Articles exhibited to jury in criminal cases.	1229.	Exhibition not objectionable because it may excite feelings of jury.
1224.	Preliminary evidence where models, maps or photographs are introduced.	1230.	Party not obliged to produce real evidence.

§ 1219. **Meaning of term.**—Real evidence is usually defined as all evidence of which any object belonging to the class of things is the source, persons also being included in respect of such properties as belong to them in common with things.<sup>1</sup> But the term is now more particularly used to denote evidence addressed to the senses of the tribunal by the production of the object itself,<sup>2</sup> and, as most often used, it is practically anonymous with what some of the old writers called "immediate real evidence."<sup>3</sup>

<sup>1</sup> Black Law Dict.; 2 Bouvier Law Dict. (Rawles' Ed.) 827.

<sup>2</sup> See ante vol I, § 24.

<sup>3</sup> In the recent case of *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. 514, 516, the subject is considered at length and the definition and classification of Best are quoted with approval as follows: "Real evidence is either immediate

or reported. Immediate real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses

§ 1220. **The rule.**—Various things may be exhibited in open court which the court or jury may note with their senses.\* Among the things that may be so exhibited, in a proper case, are: Wounds and injuries, models, diagrams, maps, weapons and missiles, features of a child, marks of identity, photographs, view of premises, tools and instruments of crime, clothing of an injured person, and writings. When convenient, the objects are produced in the court for inspection. No general rule of much practical use can be laid down upon the subject. The matter is much within the discretion of the trial court. About all that can be said in the way of a general rule is that, if the evidence is relevant, and there is no good reason for excluding it in the particular case, it should generally be admitted, and appellate courts are very slow to interfere where the trial court has admitted such evidence; but if it is irrelevant, and calculated to prejudice the other party, its admission may be cause for reversal.

§ 1221. **Development of the law.**—"Nothing," says a recent writer,<sup>b</sup> "is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether judge or jury, of objects which furnish evidence. The viewing of the land by the jury, in real actions, of a wound by the judge, where mayhem was alleged, and of the person of one alleged to be an infant, in order to fix his age, the inspection and comparison of seals, the examination of writings, to determine whether they are 'blemished,' the inspection of the implements with which a crime was committed, or of a person alleged, in a bastardy proceeding, to be the child of another, are a few illustrations of what may be found abundantly in our own legal records and textbooks for seven centuries past." Many matters and things that were originally submitted only to the inspection of the judge are now submitted to the jury as real evidence. The history, growth and development of the law in this regard is well

or documents. This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence."

\*Thomas Fruit Co. v. Start, 107 Cal. 206, 40 Pac. 336; McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711; Commonwealth v. Allen, 128 Mass. 46, 35 Am. R. 356; Disotell v. Henry Luther Co. 90 Wis. 635, 64 N. W. 425; Gaunt v. State, 50 N. J. L. 490,

14 Atl. 600; Stevenson v. Michigan Log, &c. Co. 103 Mich. 412, 61 N. W. 536; Tudor Iron Works v. Weber, 129 Ill. 535, 21 N. E. 1078; Story v. State, 99 Ind. 413; State v. Ellwood, 17 R. I. 763; Franklin v. State, 69 Ga. 36, 47 Am. R. 748; Osborne v. Detroit, 32 Fed. 36.

<sup>b</sup>See Thayer Cases Ev. (2d ed.) 720.



shown by the writer already referred to, and the use of such evidence is now so well established that it is unnecessary to review the earlier authorities.<sup>6</sup>

§ 1222. **Articles shown to jury in civil cases.**—Among the many examples of articles exhibited to the jury in civil cases the following may be mentioned: Defective tools,<sup>7</sup> defective articles, such as mirrors,<sup>8</sup> horse shoes,<sup>9</sup> shingles,<sup>10</sup> and fruit boxes,<sup>11</sup> torn clothing in a case of damages for negligence,<sup>12</sup> and alleged defective building material.<sup>13</sup> So, also, a sample of goods may be shown;<sup>14</sup> likewise, by illustration, the length of a minute,<sup>15</sup> the use of a magnifying glass,<sup>16</sup> and the effects of a substance,<sup>17</sup> in a proper case.

§ 1223. **Articles exhibited to jury in criminal cases.**—Articles may be exhibited to the jury in criminal cases which tend to explain the material facts at issue. Among the many articles that have been exhibited in such cases are the following: burglar's tools,<sup>18</sup> stolen articles,<sup>19</sup> clothing,<sup>20</sup> bones,<sup>21</sup> weapons and bullets,<sup>22</sup> and surgical instru-

<sup>6</sup> The old case of *Rex v. Vaughan* (1696), 13 How. St. Tr. 517, furnishes an interesting, if not entirely satisfactory, illustration. "If it be the same gentleman," said a witness, referring to the defendant and attempting to identify him, "his hair is reddish." L. C. J. Holt: "Pull off his peruke." (Which was done.) . . . Baron Powis: "Let somebody look on it more particularly." (Then an officer took a candle and looked on his head, but it was shaved so close the color could not be discerned.) See, also, Y. B. 38, H. VI, 13, 27; Bracton's Note Book iii, case 1115.

<sup>7</sup> *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283; *King v. New York, &c. R. Co.* 72 N. Y. 607.

<sup>8</sup> *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099.

<sup>9</sup> *Evarts v. Middlebury*, 53 Vt. 626.

<sup>10</sup> *Morton v. Fairbanks*, 11 Pick. (Mass.) 368.

<sup>11</sup> *Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336.

<sup>12</sup> *Tudor Iron Works v. Weber*,

129 Ill. 535 21 N. E. 1078; *Northern Ala. R. Co. v. Mansell* (Ala.), 36 So. 459.

<sup>13</sup> *People v. Buddenseick*, 103 N. Y. 487, 57 Am. R. 766.

<sup>14</sup> *Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336.

<sup>15</sup> *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37.

<sup>16</sup> *Morse v. Blanchard*, 117 Mich. 37, 75 N. W. 93; *Short v. State*, 63 Ind. 376, 380.

<sup>17</sup> *Eidt v. Cutler*, 127 Mass. 522. See, also, *King v. New York Central, &c. R. Co.* 72 N. Y. 607.

<sup>18</sup> *State v. Ellwood*, 17 R. I. 763.

<sup>19</sup> *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910.

<sup>20</sup> *People v. Fernandez*, 35 N. Y. 49; *Story v. State*, 99 Ind. 413.

<sup>21</sup> *Turner v. State*, 89 Tenn. 547; *State v. Morley*, 102 Mo. 374.

<sup>22</sup> *Siberry v. Smith*, 133 Ind. 677; *Commonwealth v. Brown*, 121 Mass. 69; *Leonard v. Railway Co.* 21 Ore. 555.

ments for abortion.<sup>23</sup> After the identification of a weapon it may be introduced in evidence, in a proper case, and considered a part thereof.<sup>24</sup>

**§ 1224. Preliminary evidence where models, maps or photographs are introduced.**—Models, maps and photographs are often introduced in evidence, but preliminary evidence is necessary to satisfy the trial court that the representation, that is, the model, map or photograph, is correct.<sup>25</sup> After such question is determined by the court, however, and the representation is found sufficiently accurate to be admitted, the question, in a sense, becomes one for the jury, as its effect is necessarily for the jury to consider and determine under all the evidence.

**§ 1225. Models and maps.**—Models and maps, when properly identified and authenticated, and where the things they represent are relevant, may be admitted as evidence of such things.<sup>26</sup> It is not necessary that the map should be an official one.<sup>27</sup> The map, if not official, however, must be verified,<sup>28</sup> but it may be made by the one testifying, or by some other person.<sup>29</sup> If the map is not official the one testifying must have knowledge of the real object represented by the map.<sup>30</sup> The

<sup>22</sup> Commonwealth v. Brown, 121 Mass. 69.

<sup>24</sup> Wynne v. State, 56 Ga. 113; McDonnell v. State, 90 Ind. 320; Commonwealth v. Brown, 14 Gray (Mass.) 419; State v. Roberts, 63 Vt. 139; Rodriguez v. State, 32 Tex. Cr. App. 259, 22 S. W. 978.

<sup>25</sup> Ortiz v. State, 30 Fla. 256; Cleveland, &c. R. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869; Commonwealth v. Morgan, 159 Mass. 375, 34 N. E. 458; State v. Cook, 75 Conn. 267, 53 Atl. 589; Locke v. Railway Co. 46 Iowa, 109. But maps or diagrams are sometimes used by way of illustration, without being admitted in evidence, and this may be permitted without proof that they are strictly accurate. Lake Street El. R. Co. v. Burgess, 200 Ill. 628, 66 N. E. 215.

<sup>29</sup> Weld v. Brooks, 152 Mass. 297, 25 N. E. 719; Whitehead v. Ragan,

106 Mo. 231; Moran Bros. Co. v. Snoqualmin, &c. Co. (Wash.), 69 Pac. 759; Donohue v. Whitney, 133 N. Y. 178, 30 N. E. 848; Curtis v. Aaronson, 49 N. J. L. 68; McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. 143; Penn. Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938; Vance v. Fore, 24 Cal. 436; Ortiz v. State, 30 Fla. 256; Wolfe v. Scarborough, 2 Ohio St. 361.

<sup>27</sup> Hale v. Rich. 48 Vt. 224; Justen v. Scharf, 175 Ill. 45, 51 N. E. 695; Turner v. United States, 30 U. S. App. 90.

<sup>28</sup> People v. Johnson, 140 N. Y. 350, 35 N. E. 604; Commonwealth v. Switzer, 134 Pa. St. 388, 19 Atl. 681. Introduced as part of one's testimony it is considered equal to a verification.

<sup>29</sup> Shook v. Pate, 50 Ala. 92; State v. Whiteacre, 98 N. Car. 753.

<sup>30</sup> See cases in note 28, supra.

same rule holds as to charts, plans, diagrams and sketches.<sup>31</sup> So also as to models.<sup>32</sup>

§ 1226. **Photographs—In general.**—A photograph of a person or thing, when duly authenticated and of a relevant matter, is properly admitted in evidence when the original person or thing cannot be viewed.<sup>33</sup> Photographs of persons, animals, or conditions that no longer exist are often the best evidence that can be obtained, and they are also often used in connection with the testimony of witnesses as explanatory thereof, so as to enable the jury to clearly understand and apply it.

§ 1227. **Photographs—Illustrative cases—Where admitted.** Among the many illustrations where photographs have been used may be mentioned the following: To show the appearance of a street;<sup>34</sup> to show the appearance of a person;<sup>35</sup> to identify a person;<sup>36</sup> to identify a place,<sup>37</sup> and to identify a record.<sup>38</sup> And photographic copies of instruments and documents, where the originals are in other courts or

<sup>31</sup> *Nolin v. Parmer*, 21 Ala. 71; *Clapp v. Norton*, 106 Mass. 33; *Ben-nison v. Walbank*, 38 Minn. 313; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *Ordway v. Haynes*, 50 N. H. 159; *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Ragland v. State* (Ark.), 70 S. W. 1039.

<sup>32</sup> *Davis v. Power Co.* 107 Cal. 563, 40 Pac. 950; *Penn. Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938; *State v. Fox*, 25 N. J. L. 602.

<sup>33</sup> *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Bliss v. Johnson*, 76 Cal. 597; *Gilbert v. West End St. R. Co.* 160 Mass. 403, 36 N. E. 60; *Ortiz v. State*, 30 Fla. 256; *German Theological School v. Dubuque*, 64 Iowa, 736; *Church v. Milwaukee*, 31 Wis. 512; *Cooper v. St. Paul City R. Co.* 54 Minn. 379; *Cleveland, &c. R. Co. v. Monaghan*, 146 Ill. 474, 30 N. E. 869; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367.

See, also, the following articles: 31 Cent. Law Jour. 414; 41 Cent. Law Jour. 92; 20 Albany Law Jour.; 5 Green Bag, 15, 60; note in 75 Am. St. 468-479.

<sup>34</sup> *German Theological School v. Dubuque*, 64 Iowa, 736; *Blair v. Pelham*, 118 Mass. 421; *Turner v. Boston, &c. R. Co.* 158 Mass. 261; *Cleveland R. Co. v. Monaghan*, 140 Ill. 474; *Church v. Milwaukee*, 31 Wis. 512; *Archer v. N. Y. &c. R. Co.* 106 N. Y. 589. So of the locus in quo in an action for damages caused by grading a street. *Robinson v. City of St. Joseph* (Mo.), 71 S. W. 465.

<sup>35</sup> *Commonwealth v. Morgan*, 159 Mass. 375; *Cowley v. People*, 83 N. Y. 464, 38 Am. R. 464.

<sup>36</sup> *Beavers v. State*, 58 Ind. 530; *State v. Holden*, 42 Minn. 350.

<sup>37</sup> *Blair v. Pelham*, 118 Mass. 421.

<sup>38</sup> *Leathers v. Salvor Wrecking Co.* 2 Wood (U. S.) 680.

governmental departments, and are not obtainable,<sup>39</sup> have been received.

So photographs are admitted to identify a scarred corpse,<sup>40</sup> to show the appearance of a person after an assault,<sup>41</sup> and the appearance in cases of homicide.<sup>42</sup> They are also admitted to show appearance of animals when alive, and to show the appearance of a railroad wreck caused by a collision.<sup>43</sup> There are numerous cases where they are admitted to show the scene of a murder,<sup>44</sup> of an assault<sup>45</sup> or an accident.<sup>46</sup> But a photograph of the locality of an accident was held inadmissible where the situation had greatly changed before the photograph was taken.<sup>47</sup>

There is a marked conflict of authority as to the introduction of photographs as to cases of proof of handwriting. But it is sufficient at this place to refer to some of the leading authorities upon the subject, with the simple statement that, according to the weight of authority, a photograph of a writing not in evidence is not ordinarily admissible as a standard of comparison.<sup>48</sup> It may sometimes be used where the original is in evidence, or where the original if admitted to be genuine cannot be obtained.

### § 1228. Photographs—Miscellaneous.—As a general rule photo-

<sup>39</sup> *Daley v. McGuire*, 6 Blatchf. (U. S.) 137; *Leathers v. Salvor Wrecking Co.* 2 Wood (U. S.) 680.

<sup>40</sup> *Udderzook v. Commonwealth*, 76 Pa. St. 340.

<sup>41</sup> *Franklin v. State*, 69 Ga. 36, 42, 47 Am. R. 748.

<sup>42</sup> *Luke v. Calhoun*, 52 Ala. 18.

<sup>43</sup> *Boch v. Iowa Central R. Co.* 112 Iowa, 241; *Kansas City, &c. R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. 753.

<sup>44</sup> *People v. Pustolka*, 149 N. Y. 570; *Keyes v. State*, 122 Ind. 527; *Commonwealth v. Chance*, 174 Mass. 245, 75 Am. St. 306; *State v. O'Reilly*, 126 Mo. 597.

<sup>45</sup> *State v. Kelley*, 46 S. Car. 55; *State v. Herson*, 90 Me. 273.

<sup>46</sup> *Miller v. Louisville, &c. R. Co.* 128 Ind. 97, 25 Am. St. 416; *Carey v. Hubbardston*, 172 Mass. 106; *Warner v. Randolph*, 18 N. Y. App. Div. 458; *Baustian v. Young*, 152

Mo. 317, 75 Am. St. 462; *Stewart v. St. Paul City R. Co.* 78 Minn. 110.

<sup>47</sup> *Chicago, &c. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739.

<sup>48</sup> *Tome v. Parkersburg, &c. Co.* 39 Md. 36, 17 Am. R. 540; *Geer v. Missouri, &c. Co.* 134 Mo. 85, 55 Am. St. 489; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. R. 538; composite photograph of several genuine, inadmissible for comparison with disputed: *Vanderslice v. Snyder*, 4 Pa. Dist. 424; use can never be compulsory: *Matter of Foster*, 34 Mich. 21; *Maclean v. Scripps*, 52 Mich. 214. But see *Matter of Gordon*, 50 N. J. Eq. 397; *Luco v. United States*, 23 How. (U. S.) 515; *Green v. Terwilliger*, 56 Fed. 384; *Rowell v. Fuller*, 59 Vt. 688; *Marcy v. Barnes*, 16 Gray (Mass.) 161, 77 Am. Dec. 405; *In re Stephens*, L. R. 9 C. P. 187; note in 75 Am. St. 476; 15 Am. & Eng. Ency. of Law, 274.

graphs are considered as secondary evidence.<sup>49</sup> But it has been held to be no ground of objection to the admission of photographs that the opposing party does not have the right to cross-examine.<sup>50</sup> And there are cases in which photographs may be primary evidence, as, for instance, where the character of the photograph itself is directly in issue.<sup>51</sup> Roentgen or X-ray photographs,<sup>52</sup> enlarged photographs<sup>53</sup> or stereoscopic views<sup>54</sup> may be used in a proper case. But photographs have been held to be inadmissible when used for an improper purpose or when they bring improper evidence before the jurors<sup>55</sup> or improperly play upon their passions.<sup>56</sup> Thus, in a recent case, which was an action by a husband against a railroad company for damages for the death of his wife, the introduction of a photograph of the wife, who appeared to be a handsome woman, was held to be reversible error.<sup>57</sup> By preliminary proof the photographs must be shown to be accurate representations.<sup>58</sup> This is usually done by the testimony of the photographer or by some one else who is conversant with the object represented and states that it correctly represents the object.<sup>59</sup>

<sup>49</sup> *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433; *Church v. Milwaukee*, 31 Wis. 512; *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 19 Am. St. 109, 24 N. E. 1053; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. R. 315; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. 462, 53 S. W. 921; *Howard v. Illinois Trust, &c. Bank*, 189 Ill. 569, 59 N. E. 1106.

<sup>50</sup> *State v. O'Reilly*, 126 Mo. 597.

<sup>51</sup> *Barnes v. Ingalls*, 39 Ala. 193; *People v. Muller*, 32 Hun (N. Y.) 209.

<sup>52</sup> *Haynes Murder Trial*, 56 Alb. Law Jour. 309; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299; *Tish v. Welker*, 7 Ohio N. P. 472, 476, 5 Ohio Dec. 725; *Hohly v. Sheely*, 21 Ohio C. C. 484; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804. See article in 55 Cent. Law Jour. 401, 473.

<sup>53</sup> *Howard v. Illinois Trust Bank*, 189 Ill. 569, 59 N. E. 1106; *Barker v. Perry*, 67 Iowa, 146; *United States*

*v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. 466. Contra: *White Sew. Mach. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 105.

<sup>54</sup> *German Theological School v. Dubuque*, 64 Iowa, 736.

<sup>55</sup> *Guhl v. Whitcomb*, 109 Wis. 69; *Fore v. State*, 75 Wis. 727.

<sup>56</sup> *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. 892, 80 N. W. 944.

<sup>57</sup> *Smith v. Lehigh Valley R. Co.* 177 N. Y. 379, 69 N. E. 729.

<sup>58</sup> *Ortiz v. State*, 30 Fla. 256; *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. 466; *Wabash R. Co. v. Jenkins*, 84 Ill. App. 511; *Blair v. Pelham*, 118 Mass. 420; *Church v. Milwaukee*, 31 Wis. 512; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. R. 538; *Beardslee v. Columbia Tp.* 188 Pa. St. 496, 68 Am. St. 883; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

<sup>59</sup> *Carlson v. Benton (Neb.)*, 92 N. W. 600; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

**§ 1229. Exhibition not objectionable because it may excite feelings of jury.**—It is sometimes objected that the exhibition of certain articles, as bloody clothing, weapons of crime, and the like, is improper, because they tend to excite the feelings of the jury. Courts almost universally repudiate such objections as giving no ground for causing apprehension.<sup>60</sup> So, in an action for assault and battery, by which the plaintiff lost an eye, where this objection was made, it was held that the exhibition of the empty eye-socket to the jury, though tending to excite pity and sympathy, was proper as being the best evidence of the extent and character of the injury.<sup>61</sup>

**§ 1230. Party not obliged to produce real evidence.**—A party is not, ordinarily, obliged to produce real evidence without an order to such effect, but the failure so to do may, in some instances, be properly commented upon before the jury. This makes it important, when practicable, that such evidence should be produced. But in some cases it is held not even necessary for the latter purpose to produce such evidence. In one case the subject is thus treated: "But there are many exceptions as to writings. An inscription on a banner or flag, carried about by the leaders of a riot, may be proved orally. Or a direction contained on a parcel. Or a notice to an indorser of a promissory note. In the present case the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag, with the written direction upon it, might have been more satisfactory to the jury than an oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters."<sup>62</sup>

<sup>60</sup> *Walsh v. People*, 88 N. Y. 467. This is also expressly or impliedly decided in many of the cases already cited.

<sup>61</sup> *Orscheln v. Scott*, 90 Mo. App. 352. See, also, *Omaha St. R. Co. v. Emminger*, 57 Neb. 240, 77 N. W.

675. But compare *Rost v. Brooklyn Heights R. Co.* 10 N. Y. App. Div. 477; *Brown v. Swineford*, 44 Wis. 282, 28 Am. R. 582 (indecent exposure).

<sup>62</sup> *Commonwealth v. Morrell*, 99 Mass. 542.

## CHAPTER LVII.

### INSPECTION AND VIEW.

Sec.		Sec.	
1231.	Inspection of person—View of premises.	1238.	Compulsory examination—The prevailing doctrine.
1232.	Inspection and physical examination in criminal cases.	1239.	Application for order for compulsory examination.
1233.	Inspection of chattels.	1240.	Manner of conducting examination.
1234.	Exhibition to show age, race, or color.	1241.	Order for inspection of person—How enforced.
1235.	Exhibition to show resemblance.	1242.	View by jury—Discretion of court.
1236.	Voluntary exhibition of injured part in personal injury cases.	1243.	Object of view—Whether evidence.
1237.	Compulsory examination of person.	1244.	Manner of proceeding—Irregularities.

§ 1231. **Inspection of person—View of premises.**—We have already referred to cases in which inspection of persons and articles may be had, in treating the subject of real evidence in the last preceding chapter, but a fuller treatment of the particular subject is desirable. Trial by inspection or examination was a well recognized mode of procedure under the old common law in certain cases, and inspection of persons and things by the tribunal is yet often resorted to in modern practice,<sup>1</sup> especially in criminal cases, and in actions for damages for personal injuries; but it is said that no order to inspect the body

<sup>1</sup> 3 Blackstone Comm. 329; "Trial by Inspection," 25 Cent. Law Jour. 3.

of a party in a personal injury case appears to have been made in any English court at common law.<sup>2</sup> In accordance with the old practice, where not changed by statute, an inspection may be had in criminal trials where a female defendant, who has been found guilty, pleads her pregnancy in stay of execution,<sup>3</sup> although a compulsory examination of the person of the plaintiff has been denied in other criminal cases.<sup>4</sup> So, it may often be had where the question of personal identity, age, or legitimacy arises.<sup>5</sup>

In proceedings for divorce or nullity of marriage on the ground of impotency or sexual incapacity, an inspection may be ordered when shown to be necessary.<sup>6</sup> So, an inspection, or view of the premises, is usually provided for by statute in proceedings to lay out roads, and the like, under the power of eminent domain, and in most jurisdictions the jury may likewise be sent out to view the place where a crime was committed or an injury was inflicted, the features of which are involved in the controversy.

### § 1232. Inspection and physical examination in criminal cases.

It is common practice in criminal trials to exhibit, for the inspection of the jury, the weapon with which the crime was committed,<sup>7</sup> blood-stained clothing,<sup>8</sup> or, in general, "any material object capable of being produced in the courtroom and exhibited to the jury, the physical characteristics of which speak in evidence, in connection with the oral evidence, concerning the alleged crime."<sup>9</sup> And a constitutional pro-

<sup>2</sup> *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 253, 11 Sup. Ct. 1000.

<sup>3</sup> *Rex v. Baynton*, 17 How. St. Tr. 589, 631; *Reg. v. Wycherly*, 8 Car. & P. 262.

<sup>4</sup> *Agnew v. Jobson*, 13 Cox Cr. Cas. 625, 19 Moak, 612.

<sup>5</sup> 3 Blackstone Comm. 332; *Crow v. Jordon*, 49 Ohio St. 655, 32 N. E. 750; *Att'y Gen. v. Fadden*, 1 Price Exch. 403; *Warlick v. White*, 76 N. Car. 175; *State v. Smith*, 54 Iowa, 104, 6 N. W. 153. But see *State v. Danforth*, 48 Iowa, 43, 30 Am. R. 387; *Ihinger v. State*, 53 Ind. 251.

<sup>6</sup> *Devenbagh v. Devenbagh*, 5 Paige Ch. 554-557, 28 Am. Dec. 443; *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ecc. 408-490. *Shafto v.*

*Shafto*, 28 N. J. Eq. 34; *Le Barron v. Le Barron*, 35 Vt. 365; 2 Bishop Mar. & Div. § 590; *Anon.*, 89 Ala. 291, 7 L. R. A. 425. But this seems to be discretionary with the trial court. *Anon.*, 35 Ala. 226, 2 Danl. Ch. Pr. 1136.

<sup>7</sup> *McDonel v. State*, 90 Ind. 320; *Wyne v. State*, 56 Ga. 113; *Mitchell v. State*, 94 Ala. 68, 10 So. 518.

<sup>8</sup> *Commonwealth v. Twitchell*, 1 Brewst. (Pa.) 551; *Richards v. State*, 82 Wis. 172, 51 N. W. 652.

<sup>9</sup> See, for example, *Commonwealth v. Brown*, 121 Mass. 69; *People v. Gonzales*, 35 N. Y. 49; *Story v. State*, 99 Ind. 413; *Hart v. State*, 49 Am. R. 188, and note, 191; *People v. Wright*, 89



vision that no one shall be compelled to give testimony tending to criminate himself does not prohibit or prevent the clothing, or other articles found on the accused, from being exhibited to the jury in such a case.<sup>10</sup> A physical examination of the prisoner, however, might be virtually compelling him to criminate himself, and for this reason it is generally, and, it would seem, correctly, held that an order for such an examination cannot be made against his consent.<sup>11</sup> But this doctrine has not passed unchallenged, and the opposite view has been taken by several courts, and especially by the Supreme Court of Nevada in a carefully considered case.<sup>12</sup> And an accused may waive his right or privilege, if any he has, to object to an inspection of his person.<sup>13</sup>

§ 1233. **Inspection of chattels.**—On the trial of an issue involving the quality or condition of a chattel, the court may permit it to be exhibited to the jury with proper evidence as to its identity and condition at the time in question.<sup>14</sup> An English court even permitted a baby elephant to be brought before it.<sup>15</sup> Whether an article proposed to be exhibited in court is too cumbersome or not is said to be a question within the discretion of the trial court.<sup>16</sup> The clothing of the

Mich. 70, 50 N. W. 792; *State v. Crow*, 107 Mo. 341, 17 S. W. 745; *State v. Robinson*, 35 S. Car. 340, 14 S. E. 766; *Whetston v. State*, 31 Fla. 240, 12 So. 661; *Roderiquez v. State (Tex.)*, 22 S. W. 978.

<sup>10</sup> *Drake v. State*, 75 Ga. 413, 415. See, also, ante chapter on Privileges of Witnesses.

<sup>11</sup> *Rex v. Worsenham*, 1 Ld. Raym. 705; *People v. McCoy*, 45 How. Pr. (N. Y.) 216; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. R. 72; *State v. Jacobs*, 5 Jones L. (N. Car.) 259; *Day v. State*, 63 Ga. 667; *People v. Mead*, 50 Mich. 228; *McGennis v. State*, 24 Ind. 500. See ante chapter on Privileges of Witnesses.

<sup>12</sup> *State v. Ah Chuey*, 14 Nev. 79, 33 Am. R. 530, and note, 540. See, also, *State v. Garrett*, 71 N. Car. 85; *State v. Graham*, 74 N. Car. 646; *Walker v. State*, 7 Tex. App. 245. In these cases it is held that an

accused may be compelled to exhibit his feet or make foot prints or tracks for the purpose of comparison. See, also, *State v. Prudhomme*, 25 La. Ann. 523. So it has been held that scars or marks on the person may be shown where the question of identity arises. *Dixon v. State*, 119 Tex. 134; *State v. Ah Chuey*, 14 Nev. 79, 33 Am. R. 530.

<sup>13</sup> *Gallagher v. State*, 28 Tex. App. 347; *State v. Woodruff*, 67 N. Car. 89.

<sup>14</sup> *Line v. Taylor*, 3 F. & F. 731; *King v. New York Cent. R. Co.* 72 N. Y. 607; *Evarts v. Middlebury*, 53 Vt. 626.

<sup>15</sup> *Thurman v. Bertram*, 20 Alb. Law Jour. 151. In another case, a dog. *Line v. Taylor*, 3 F. & F. 731.

<sup>16</sup> *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

plaintiff's decedent may be exhibited to the jury in an action for damages for his death by the alleged negligence of the defendant, where it tends to establish such negligence as the cause of his death.<sup>17</sup> So, defective machinery, iron rails, and the like, may be exhibited to the jury in similar cases for the same or a like purpose.<sup>18</sup> But samples of silk, clothing, or other manufactured articles have been held inadmissible to show the condition of the machinery by which they were made.<sup>19</sup>

§ 1234. **Exhibition to show age, race or color.**—There is a diversity of opinion among the adjudicated cases as to whether the age of one may be proved by having him exhibited to the jury for their inspection. Some courts have held that this should not be permitted.<sup>20</sup> There are, however, many respectable authorities which take the contrary view.<sup>21</sup> In case there is a question in issue as to the race or color of a person, it has generally been held that such person may be exhibited to the jury to determine the question.<sup>22</sup>

§ 1235. **Exhibition to show resemblance.**—There is also a diversity of opinion in the adjudicated cases as to whether or not resemblance between persons may be proved by exhibiting such persons to the jury for inspection. The better opinion, perhaps, is that such evidence, at least in the case of a mere baby, is of "too fanciful and unsat-

<sup>17</sup> *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007; *Baggs v. Martin*, 108 Fed. 33 (and for identification and to show the nature and extent of injury). Compare *Louisville & N. R. Co. v. Pearson* (Ala.), 12 So. 176, and see *Northern Ala. R. Co. v. Mansell* (Ala.), 36 So. 459.

<sup>18</sup> *King v. N. Y. Cent. & C. R. Co.* 72 N. Y. 607. But see *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955. In *Viellesse v. City of Green Bay*, 110 Wis. 160, 85 N. W. 665, it was held no error to permit a witness to exhibit a piece of rotten plank out of a sidewalk where the injury complained of was received.

<sup>19</sup> *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641. This section is taken largely from our work on General Practice, and several other sections in this chapter, and in one

or two other chapters are taken in the main from that work with few alterations.

<sup>20</sup> *Thinger v. State*, 53 Ind. 251; *Bird v. Stone*, 104 Ind. 384, 3 N. E. 827. See, also, *Poynor v. Holzgraf* (Tex. Civ. App.), 79 S. W. 829.

<sup>21</sup> *Commonwealth v. Emmons*, 98 Mass. 6; *Keith v. New Haven, & N. Co.* 140 Mass. 175; *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *Hermann v. State*, 73 Wis. 248, 41 N. W. 171, 9 Am. St. 789. See, also, *Williams v. State*, 98 Ala. 52; *State v. Arnold*, 13 Ired. L. (N. Car.) 184.

<sup>22</sup> *Garvin v. State*, 52 Miss. 207; *Warlick v. White*, 76 N. Car. 175; *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56, 6 Am. St. 221; *State v. Saldell*, 70 N. H. 174, 46 Atl. 1083; *Morrison v. People*, 52 Ill. App. 482.

isfactory a character to be received.”<sup>23</sup> Many courts, however, treat such an exhibition as proper.<sup>24</sup> In one case<sup>25</sup> the court argues as follows: “There seems to be no good reason why a jury, if the question of resemblance is to be considered by them, should be compelled to base their decision upon a second-hand view. The effect of the substitution of testimony for inspection is to put the subject matter of investigation one further remove from its responsible judges, and thus to add to the infirmities inherent in proof of this class the additional danger of bias and imposition. Inspection is like admission in that, while not testimony, it is an instrument for dispensing with testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance. Thus regarded, and in view of the almost utter worthlessness of the testimony of witnesses adduced in the question of the resemblance of a bastard to an alleged parent, it is obvious that inspection is, on this account, also to be preferred. In the case under consideration the child was in court during the trial, the attention of the jury was directed to it as the offspring of the alleged fornication, the defendant was a witness in the cause; under these circumstances it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all, and that, if they did consider it, it must be from the testimony from the mouths of witnesses, and not from their own view.”<sup>26</sup>

**§ 1236. Voluntary exhibition of injured part in personal injury cases.**—Cases in which an exhibition of the person most frequently occurs are those of a plaintiff suing for personal injuries who volun-

<sup>23</sup> *Risk v. State*, 19 Ind. 152; *La Matt v. State*, 128 Ind. 123, 27 N. E. 346; *Keniston v. Rowe*, 16 Me. 38; *Honawalt v. State*, 64 Wis. 84, 24 N. W. 489; *State v. Danforth*, 48 Iowa, 43, 30 Am. R. 387; *Clark v. Bradstreet*, 80 Me. 456, 15 Atl. 56, 6 Am. St. 221. See, also, *Ingram v. State*, 24 Neb. 33, 37 N. W. 943; *State v. Harvey*, 112 Iowa, 416, 84 N. W. 535, 52 L. R. A. 500; *People v. Carney*, 29 Hun (N. Y.) 47; *Harrison v. People*, 81 Ill. App. 93; *State v. Brathrode*, 81 Minn. 501, 84 N. W. 340.

<sup>24</sup> *Gilmanton v. Ham*, 38 N. H. 108; *Re Jessup*, 81 Cal. 408; *Jones v. Jones*, 45 Md. 144; *Paulk v. State*,

52 Ala. 427; *Crow v. Jordan*, 49 Ohio St. 665; *Young v. Makepiece*, 103 Mass. 50, 54; *Scott v. Donovan*, 153 Mass. 378; *State v. Smith*, 54 Iowa, 104, 37 Am. R. 192; *State v. Woodruff*, 67 N. Car. 90; *State v. Horton*, 100 N. Car. 443, 6 Am. St. 613.

<sup>25</sup> *Gaunt v. State*, 50 N. J. L. 490, 495, 14 Atl. 600.

<sup>26</sup> And so *Hudgins v. Wrights*, 1 Hen. & M. (Va.) 141; *Hook v. Paguee*, 2 Munf. (Va.) 384; *Gentry v. McMinnis*, 3 Dana (Ky.) 386; *Linton v. The State*, 88 Ala. 216; *Commonwealth v. Jordan*, 49 Ohio St. 455.

tarily makes an exhibition of his injuries to the jury.<sup>27</sup> It has frequently been decided not to be objectionable for a plaintiff, in a personal injury case, to exhibit the injured part of the body to the jury.<sup>28</sup> This often supplies important evidence as to the extent and character of the injury, and it does not deprive the defendant of any substantial right on appeal because an appellate does not weigh the evidence, and, if such an objection were tenable, it would prevent all viva voce testimony, the effect of which necessarily depends very largely upon the appearance and demeanor of the witness.<sup>29</sup>

§ 1237. **Compulsory examination of person.**—There has been much conflict among the authorities as to whether the court can compel an exhibition of an injured part to the jury, or a physical examination before trial, in civil cases as well as in criminal cases, but the great weight of authority is to the effect that it may do so in a proper case. The Supreme Court of the United States has held that the courts have no such power,<sup>30</sup> and this decision was followed for a time in a number

<sup>27</sup> Louisville, &c. R. Co. v. Wood, 113 Ind. 549, 14 N. E. 572; Tudor Iron Works v. Weber, 129 Ill. 535, 21 N. E. 1078; Longworthy v. Green, 95 Mich. 93, 96, 54 N. W. 697; Sherwood v. Sioux Falls, 10 S. Dak. 405, 73 N. W. 913; Missouri, &c. R. Co. v. Moody (Tex. Civ. App.), 79 S. W. 856; Carrico v. R. Co. 39 W. Va. 86, 89; Citizens' St. R. Co. v. Willowby, 134 Ind. 563, 33 N. E. 627; Williams v. Nally, 20 Ky. 224, 46 S. W. 874; Barker v. Perry, 67 Iowa, 146; Mulhado v. Brooklyn City R. Co. 30 N. Y. 370. See, also, for cases in which an inspection of incompetent persons was allowed, Rex v. Goode, 7 A. & E. 535; Walker's Trial, 23 How. St. Tr. 1154; Keith v. New Hampshire, &c. Co. 140 Mass. 175, 180.

<sup>28</sup> Disotell v. Henry Luther Co. 90 Wis. 635, 64 N. W. 425; Rice v. Rice, 47 N. J. 559, 21 Atl. 286; Barker v. Town of Perry, 67 Iowa, 146; Louisville R. Co. v. Wood, 113 Ind. 544; Brown v. Swineford, 44 Wis. 282, 28 Am. R. 582; Cunning-

ham v. Union Pac. R. Co. 4 Utah, 206; Chicago, &c. R. Co. v. Krayenbuhl (Neb.) 98 N. W. 44, 15 Cent. Law Jour. 2.

<sup>29</sup> Louisville, &c. R. Co. v. Wood, 113 Ind. 549, 14 N. E. 572. But the court ought not, in justice, to permit an unfair and spectacular exhibition. Clark v. Brooklyn Heights R. Co. 177 N. Y. 359, 69 N. E. 647.

<sup>30</sup> Union Pac. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000. See, also, Penna. Co. v. Newmeyer, 129 Ind. 401; Parker v. Enslow, 102 Ill. 272; Pittsburg, &c. R. Co. v. Story, 104 Ill. App. 132; Peoria, &c. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; McQuigan v. Delaware, &c. R. Co. 129 N. Y. 50, 29 N. E. 235; Stuart v. Havens, 17 Neb. 211; Lloyd v. Hannibal, &c. R. Co. 53 Mo. 509; Galveston, &c. R. Co. v. Sherwood, 67 S. W. 776, 777; Mills v. Railroad Co. (Del.), 40 Atl. 1114; Stack v. New York, &c. R. Co. 177 Mass. 155, 58 N. E. 686 (no power in absence of statute).

of states,<sup>31</sup> but in nearly all of them it is now held that such power exists, although in one or two of them the change was made by statute. Even where it was held that the court had no power to compel an examination of the person it was held that this did not apply to an examination of urine, and that, in an action for damages for injuries resulting in the alleged dislocation of the plaintiff's kidneys, thereby producing the secretion of albumen and sugar in the urine, the plaintiff might be required to produce specimens of his urine in court for examination and analysis.<sup>32</sup>

§ 1238. **Compulsory examination—The prevailing doctrine.**—The prevailing doctrine is stated in a recent case,<sup>33</sup> by one of the courts, that, for a time, took the contrary view, and it is said that the authorities establish the following propositions:

“That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding.”<sup>34</sup>

<sup>31</sup> See authorities cited in last note, *supra*.

<sup>32</sup> *Cleveland, &c. R. Co. v. Hudleston*, 151 Ind. 540, 46 N. E. 678, 36 L. R. A. 681, 68 Am. St. 238.

<sup>33</sup> *City of South Bend v. Turner*, 156 Ind. 418, 428, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 200.

<sup>34</sup> Citing *Alabama, &c. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 9 L. R. A. 442; *King v. State*, 100 Ala. 85, 14 So. 878; *Sibley v. Smith*, 46 Ark. 275; *St. Louis, &c. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Richmond &c. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602,

§ 1239. **Application for order for compulsory examination.**—The application for an order for a physical examination of the plaintiff should be made in due time, so as not to unnecessarily prolong the trial or prejudice the plaintiff in any way,<sup>35</sup> and, as stated in the opinion from which the quotation is made in the last preceding section, it should ordinarily be made before the trial,<sup>36</sup> and there are doubtless cases in which the order may be refused, without reversible error, as not applied for in time, even though the application was made as early as the day before the trial,<sup>37</sup> although it has been held, on the other hand, that it is not error to grant such an application, even though it was not made until after the trial had commenced and the jury had been sworn.<sup>38</sup> As to the form of the application and what it should contain, the statute of the particular jurisdiction usually controls. It may be said generally, however, that it must ordinarily be made to appear that there is some reasonable necessity for the examination, and that the applicant has reasonable ground to believe that he can thus obtain material information to which he is entitled, and which the ends of justice require should be ascertained, and that it cannot well be obtained without such an examination.<sup>39</sup>

3 L. R. A. 808; *Hall v. Town of Manson*, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; *Atchison, &c. R. Co. v. Thul*, 29 Kans. 466; *Belt Electric Co. v. Allen* (Ky.), 44 S. W. 89; *Graves v. City of Battle Creek*, 95 Mich. 266, 54 N. W. 757; *Shepard v. Missouri, &c. R. Co.* 85 Mo. 629; *Sidekum v. Wabash, &c. R. Co.* 93 Mo. 400, 4 S. W. 701; *Owens v. Kansas City, &c. R. Co.* 95 Mo. 169, 8 S. W. 350; *Hatfield v. St. Paul, &c. R. Co.* 33 Minn. 130, 22 N. W. 419; *Hess v. Lake Shore, &c. R. Co.* 7 Pa. C. C. 565; *Miami, &c. Co. v. Baily*, 37 Ohio St. 104; *Chicago, &c. R. Co. v. Langston*, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; *White v. Milwaukee, &c. R. Co.* 61 Wis. 536, 21 N. W. 524; *O'Brien v. City of LaCrosse*, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831. See, also, *Lyon v. Manhattan R. Co.* 142 N. Y. 298, 37 N. E. 113; *Atchison, &c. R. Co. v. Palmore*

(Kans.), 75 Pac. 509, 64 L. R. A. 90; *Brown v. Chicago, &c. R. Co.* (N. Dak.), 95 N. W. 153.

<sup>35</sup> *Miami, &c. Turnp. Co. v. Baily*, 37 Ohio St. 104; *Terre Haute, &c. R. Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. 355.

<sup>36</sup> *Stuart v. Havens*, 17 Neb. 211; *Chadron v. Glover*, 43 Neb. 737, 62 N. W. 62; *Savannah, &c. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622; *Southern Kans. R. Co. v. Michaels*, 57 Kans. 480, 46 Pac. 938; *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462.

<sup>37</sup> *Kinney v. Springfield*, 35 Mo. App. 97.

<sup>38</sup> *Schroeder v. Chicago, &c. R. Co.* 47 Iowa, 381.

<sup>39</sup> *Alabama, &c. R. Co. v. Hill*, 90 Ala. 71, 77, 8 So. 90, 24 Am. St. 764; *Atchison, &c. R. Co. v. Thul*, 29 Kans. 466, 44 Am. R. 659; *Sib-*

§ 1240. **Manner of conducting examination.**—The examination should be made, unless the statute otherwise specifically provides, under such restrictions and directions, and at such place and time, as the court in the exercise of a sound discretion may deem proper.<sup>40</sup> The plaintiff should not be subjected to unnecessary annoyance or exposure of the person,<sup>41</sup> and, if the examination would endanger the life or health of the plaintiff, or be very painful, the application should be refused.<sup>42</sup> The examination is usually ordered to be made by or in the presence of experts, to be named or appointed by the court,<sup>43</sup> and if either party is allowed to have a representative or representatives present, as is usually the case, the other should be allowed a similar privilege.<sup>44</sup>

§ 1241. **Order for inspection of person—How enforced.**—In cases and in jurisdictions in which the court has the right to require a party to submit to a personal examination, it must also have power to enforce its order. This power has been exercised in various ways. If the plaintiff refuses to obey an order for examination or inspection, properly made, the court, as stated in the opinion quoted in a preceding section,<sup>45</sup> may dismiss the action, or refuse to permit him to give evidence of his injury,<sup>46</sup> and it has been held, in some jurisdictions, that he may, if necessary, be punished as for contempt.<sup>47</sup>

ley v. Smith, 46 Ark. 275, 276, 55 Am. R. 584; Owens v. Kansas City, &c. R. Co. 95 Mo. 169, 8 S. W. 350, 6 Am. St. 39; Belle, &c. Distilling Co. v. Riggs (Ky.), 45 S. W. 99.

<sup>40</sup> McGovern v. Hope, 63 N. J. 76, 42 Atl. 830; St. Louis, &c. R. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147. See, also, Belt Electric Line Co. v. Allen (Ky.), 44 S. W. 89, 80 Am. St. 374.

<sup>41</sup> Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462; McGovern v. Hope, 63 N. J. 76, 42 Atl. 830.

<sup>42</sup> O'Brien v. La Crosse, 99 Wis. 421, 75 N. W. 81; Shepard v. Missouri Pac. R. Co. 85 Mo. 629, 55 Am. R. 390; Schroeder v. Chicago, &c. R. Co. 47 Ia. 382; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616; Belt Electric Line Co. v. Allen (Ky.), 44 S. W. 89. But see

Atchison, &c. R. Co. v. Palmore (Kans.), 75 Pac. 509, 64 L. R. A. 90.

<sup>43</sup> Richmond, &c. R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95.

<sup>44</sup> McGovern v. Hope, 63 N. J. 76, 42 Atl. 830.

<sup>45</sup> See ante § 1238.

<sup>46</sup> Turnpike Co. v. Bailly, 37 Ohio St. 104; Anon, 89 Ala. 291, 7 L. R. A. 425; Hess v. Lake Shore, &c. R. Co. 7 Pa. Co. Ct. 565.

<sup>47</sup> Harrison v. Sparrow, 7 Eng. Ecc. 357; Schroeder v. McDonald, 47 Iowa, 381. See, also, as to the penalty in case the defendant will not submit to an order for inspection. Newell v. Newell, 9 Paige (N. Y.) 25; Anon. 35 Ala. 226, 228.

§ 1242. **View by jury—Discretion of court.**—Under the statutes in force in most of the states, and perhaps in certain civil cases even where no such statute exists,<sup>48</sup> the jury may be sent out to view the place where the crime was committed or the injury happened, or the features of which are involved in the controversy.<sup>49</sup> There are English statutes to the same effect, and this practice has long been followed in that country, at least in real and mixed actions. The matter is usually left to the discretion of the trial court, and its ruling, in granting or denying a view in the exercise of a sound discretion, will not be reviewed upon appeal.<sup>50</sup> A sufficient number of illustrative cases will be found in the notes.<sup>51</sup>

§ 1243. **Object of view—Whether evidence.**—The object of the view is generally, but not by any means universally, held to be to enable the jury to understand the evidence and its application, not to collect new evidence.<sup>52</sup> This, it is said, was clearly the original pur-

<sup>48</sup> See *Springer v. City of Chicago*, 135 Ill. 522, 26 N. E. 514, 12 L. R. A. 609, and consideration of the question in the opinion and note, but compare *Abbott's Tr. Brief*, 72, 26 Cent. Law Jour. 436.

<sup>49</sup> *Proffatt Jury Trials*, § 370; *Thompson Trials*, §§ 881, 882; *Chute v. State*, 19 Minn. 271, 281; *People v. Bush*, 68 Cal. 623; *Luck v. State*, 96 Ind. 16; *Erwin v. Bulla*, 29 Ind. 95; 1 *Burr.* 253, n.; 2 *Tidd Pr.* 795; "View by Jury," 26 Cent. Law Jour. 436.

<sup>50</sup> *Williams v. Grand Rapids, &c.* Co. 53 Mich. 271; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Coyner v. Boyd*, 55 Ind. 166; *Board, &c. v. Castetter*, 6 Ind. App. 579, 33 N. E. 986; *People v. Buddenseick*, 103 N. Y. 487; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Gunn v. Ohio River, &c. Co.* 37 W. Va. 421, 16 S. E. 628; *Klepsch v. Donald*, 4 Wash. St. 436, 30 Pac. 991; *Chicago, &c. R. Co. v. Leah*, 41 Ill. App. 584; *Clayton v. Chicago, &c. Co.* 67 Iowa, 238; *Smith v. St Paul, &c. Co.* 32 Minn. 1; *Jenkins v. Wilmington*

*&c. R. Co.* 110 N. Car. 438, 15 S. E. 193; "View by Jury," 26 Cent. Law Jour. 436, 437. The court may also, upon its appearing unnecessary, vacate an order for a view previously made. *Nesbit v. Kerr*, 3 *Yeates (Pa.)* 194.

<sup>51</sup> Cases in which view was held proper: *Nutter v. Ricketts*, 6 Iowa, 92; *Owens v. Railway Co.* 38 Fed. 571; *City of Springfield v. Dalbey*, 139 Ill. 34, 29 N. E. 860; *Washburn v. Milwaukee, &c. R. Co.* 59 Wis. 364, 18 N. W. 328; *Boardman v. Westchester Ins. Co.* 54 Wis. 364. Cases in which view was held properly refused: *Spencer v. Chicago*, 135 Ill. 522, 26 N. E. 514, 12 L. R. A. 609; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Richmond v. Atkinson*, 58 Mich. 413; *Clayton v. Chicago R. Co.* 67 Iowa, 238.

<sup>52</sup> *Wright v. Carpenter*, 49 Cal. 607; *Heady v. Vevay, &c. Co.* 52 Ind. 117; *Close v. Samm*, 27 Iowa, 503; *Morrison v. Burlington, &c. R. Co.* 84 Iowa, 663, 51 N. W. 75; *City of Columbus v. Bidlingmeier*, 7 Ohio C. C. 136; *Chute v. State,*



pose of the view, as shown by the English statutes,<sup>53</sup> and the reasons for adhering to the early conception of its office are well stated by the Supreme Court of California as follows: "In authorizing a court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy by a motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining. The statute could not have been intended to produce such results as these."<sup>54</sup> The impossibility of getting what the jury have seen into the record upon appeal has been an important factor in the problem, and is largely responsible for the solution already given; but, as appellate tribunals do not weigh the evidence, and as it is also impossible to get into the record the appearance and demeanor of a witness on the stand, it would seem that too much influence has been ascribed to this factor. As a matter of fact, what the jury have seen, and the knowledge they have gained by their view, must be of some probative influence,<sup>65</sup> as it is an utter impossibility to entirely shut it out from their minds, and some of the courts have held it evidence to all intents and pur-

19 Minn. 271; *Brakken v. Minneapolis, &c. R. Co.* 29 Minn. 41; *People v. Thom*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562; *Machader v. Williams*, 54 Ohio St. 344, 345, 43 N. E. 324.

<sup>53</sup> See 1 *Thompson Trials*, §§ 876, 878.

<sup>54</sup> *Wright v. Carpenter*, 49 Cal.

607, 609. See, also, the reasons given in *Close v. Samm*, 27 Iowa 503, and the exhaustive consideration in *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, where it is held that if an accused is given an opportunity to be present the fact that he is not present is no objection to the view.

<sup>55</sup> *Neff v. Reed*, 98 Ind. 341, 347.

poses.<sup>56</sup> But even where the jury are permitted to consider what they have seen as evidence, they are not at liberty to wholly disregard the other evidence in the case, and base their verdict or estimate of damages solely on what they have seen.<sup>57</sup>

§ 1244. **Manner of proceeding—Irregularities.**—Where the statute provides the course to be followed in such cases, a material variance therefrom, if shown to have been injurious to the complaining party, will usually be sufficient to cause a reversal.<sup>58</sup> Thus, for the court to send a witness with the jury, with directions for him to show the position of the different parties during the transaction in question has been held fatal error in a criminal case.<sup>59</sup> But mere irregularity, not shown to have affected the verdict, or to have harmed the complaining party, will not entitle him to a new trial or reversal of the judgment.<sup>60</sup> It has also been held that it is not available error for counsel, in arguing an application for a view, to state to the judge, in the presence of the jury, what they will see.<sup>61</sup>

There is considerable conflict among the authorities as to whether it is necessary to send the prisoner with the jury in a criminal prosecution. Doubtless, if the statute so provided, it would be fatal error to send the jury out to make the view without the prisoner, over proper objection and exception; but it has been held that a statute is not unconstitutional merely because it provides for a view of the place where the crime was committed, with the consent of the accused, in

<sup>56</sup> *City of Springfield v. Dalbey*, 139 Ill. 34, 29 N. E. 860; *Kiernan v. Railroad Co.* 123 Ill. 188, 14 N. E. 18; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Neilson v. Chicago, &c. R. Co.* 58 Wis. 516; *Toledo, &c. R. Co. v. Dunlap*, 47 Mich. 456; *Remy v. Municipality*, 12 La. Ann. 500, 503; *Hartman v. Reading, &c. R. Co. (Pa.)*, 13 Atl. 774.

<sup>57</sup> *Washburn v. Milwaukee, &c. R. Co.* 59 Wis. 364, 370, 18 N. W. 328; *Peoria Gaslight, &c. Co. v. Peoria, &c. R. Co.* 146 Ill. 372, 34 N. E. 550; *Topeka v. Martineau*, 42 Kans. 387, 5 L. R. A. 775.

<sup>58</sup> See *Erwin v. Bulla*, 29 Ind. 95; *Hayward v. Knapp*, 22 Minn. 5. Thus hearing evidence or getting

prejudicial information from others while making the view may be fatal to the verdict. See *Bradbury v. Corry*, 62 Me. 223, 16 Am. R. 449; *Harrington v. Worcester, &c. Co.* 157 Mass. 579, 32 N. E. 955; *People v. Gallo*, 149 N. Y. 106, 43 N. E. 529.

<sup>59</sup> *People v. Green*, 53 Cal. 60. See, also, *State v. Lopez*, 15 Nev. 407. But compare *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554.

<sup>60</sup> *Luck v. State*, 96 Ind. 16; *City of Indianapolis v. Scott*, 72 Ind. 196; *Johnson v. Greim*, 17 Neb. 447; *Stockwell v. Chicago, &c. R. Co.* 43 Iowa, 470.

<sup>61</sup> *Boardman v. Westchester, &c. Co.* 54 Wis. 364.

his absence; and where he requests an inspection under such a statute, it is not error for the court to permit it in his absence.<sup>62</sup> This doctrine seems to us to be well founded and supported by the better reason, where, as in many jurisdictions, it is held that the object of the view is not to gather evidence; but there are other cases in which it is held that the prisoner must accompany the jury,<sup>63</sup> and, where the knowledge that they gain from their view is considered as evidence, there is some reason for so holding.

<sup>62</sup> *Shular v. State*, 105 Ind. 289, 4 N. E. 870; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562; *State v. Adams*, 20 Kans. 311; *People v. Bonney*, 19 Cal. 426; *State v. Ah Lee*, 8 Ore. 214; *Queen v. Martin*, L. R. 1 Cr. C. R. 378. See, also, *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 298; *State v. Reed* (Idaho), 35 Pac. 706; *Commonwealth v. Van Horn*, 188 Pa. St.

143, 41 Atl. 469; *Blythe v. State*, 47 Ohio St. 234.

<sup>63</sup> *People v. Bush*, 71 Cal. 602, 10 Pac. 169; *State v. Bertin*, 24 La. Ann. 46; *Carroll v. State*, 5 Neb. 31; *Benton v. State*, 30 Ark. 328; *Foster v. State*, 70 Miss. 755, 12 So. 822. See, also, *Bostock v. State*, 61 Ga. 635; *Smith v. State*, 42 Tex. 444.

## CHAPTER LVIII.

### EXPERIMENTS AND PRACTICAL TESTS.

Sec.	Sec.
1245. Meaning of term and the rule.	1250. When evidence of experiments is admissible.
1246. Discretion of court.	1251. Evidence of experiments—Illustrative cases.
1247. Illustrations.	1252. Evidence of experiments—Similarity of conditions.
1248. Experiments by jurors out of court.	1253. Experiments with blood-hounds.
1249. Evidence of experiments out of court.	

§ 1245. **Meaning of term and the rule.**—By experiments and tests before a jury<sup>1</sup> is meant what the term indicates; that is, the making of experiments or tests in the presence of the jurors in order to enable them to understand more clearly the facts concerning some matter in issue. And the rule is that such experiments may be made when the court deems it necessary for a clear understanding of the facts in the case. If the experiment would aid the jury in determining the issues it will generally be allowed if not impracticable or highly inconvenient, but if it would tend to confuse the jury, or tend to prove or disprove only an irrelevant and immaterial fact, it will not be permitted.<sup>2</sup>

§ 1246. **Discretion of court.**—The court, in the exercise of its wise discretion, may permit the parties to make experiments before the jury as explanatory of the testimony already given. And only in a plain case of abuse will the appellate court reverse a judgment on such

<sup>1</sup> See articles 5 Green Bag, 131, 54 N. W. 1075; Commonwealth v. Brelsford, 161 Mass. 61, 36 N. E. 185, 222.

<sup>2</sup> State v. Lindoen, 87 Iowa, 702, 677.

grounds.<sup>3</sup> Practical tests and experiments made in the presence of the jury are often very effective, for, as Tennyson says, "things seen are mightier than things heard;" but such experiments are not always practicable and consistent with the speedy and orderly administration of justice by the courts, and, as already stated, the subject must be, and is, very largely within the sound discretion of the trial court.

**§ 1247. Illustrations.**—The following are some illustrations of matters in which experiments have been permitted in the presence of the jury: Trying on a suit of clothes to see whether or not a good fit;<sup>4</sup> operating a machine to see whether or not suitable to the use intended;<sup>5</sup> operating materials to show that a rail in a railway accident could not have injured the party as claimed;<sup>6</sup> experimenting with a pin by a doctor for the purpose of showing loss of the sense of feeling.<sup>7</sup> So various performances have been allowed, as the singing of songs, reading papers, and reading and writing.<sup>8</sup>

So, where the effect of the use of a blotting pad was in issue, it was held error to refuse to permit a witness to try the experiment in the presence of the jury.<sup>9</sup> In another case the agent of the plaintiff was permitted to operate a cash register in the presence of the jury, after proving that it was in the same condition as it was when the defendant returned it for failing to work properly.<sup>10</sup> The following also have been permitted: The draping of clothing,<sup>11</sup> playing and singing of music,<sup>12</sup> and the use of a burglar mask.<sup>13</sup>

**§ 1248. Experiments by jurors out of court.**—The jury have no right to gain knowledge concerning the cause by making experiments

<sup>3</sup> *Commonwealth v. Allen*, 128 Mass. 46, 35 Am. R. 356; *Hatfield v. St. Paul R. Co.* 33 Minn. 130, 53 Am. R. 14, 22 N. W. 176; *United States v. Ried*, 42 Fed. 134; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283; *United States v. Ball*, 163 U. S. 662, 673, 16 Sup. Ct. 1192; *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964.

<sup>4</sup> *Brown v. Foster*, 113 Mass. 136, 18 Am. R. 463.

<sup>5</sup> *National Cash Reg. Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622.

<sup>6</sup> *Leonard v. Southern Pac. Co.* 21 Ore. 555, 15 L. R. A. 221.

<sup>7</sup> *Osborne v. City of Detroit*, 32 Fed. 36.

<sup>8</sup> *Innis v. State*, 42 Ga. 477; *Commonwealth v. Scott*, 123 Mass. 222, 25 Am. R. 81; *Gaunt v. State*, 50 N. J. L. 490; *State v. Linkhaw*, 69 N. Car. 214, 12 Am. R. 647.

<sup>9</sup> *Farmers' &c. Bank v. Young*, 36 Iowa, 44.

<sup>10</sup> *National Cash Reg. Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622.

<sup>11</sup> *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

<sup>12</sup> *People v. Linkhaw*, 69 N. Car. 214, 12 Am. R. 647.

<sup>13</sup> *State v. Ellwood*, 17 R. I. 763.

out of court, unless under the court's supervision.<sup>14</sup> However, if such information did not affect the verdict, the court may refuse to set it aside.<sup>15</sup> And evidence of experiments made by witnesses outside of court is sometimes admissible, as will be shown in the following section.

**§ 1249. Evidence of experiments out of court.**—In making experiments, in order that they should be of any value, it must usually appear that they were made under the same conditions, or under substantially similar conditions, to those surrounding the transaction in question, and difficulty will often be encountered in this respect. So, evidence of experiments made outside of court is collateral in its nature, is liable to consume the time of the court in the trial of a collateral issue, and confuse or mislead the jury. For these reasons such evidence is not always looked upon with favor, and is not ordinarily admissible unless it is shown that the conditions were similar. So, if such evidence would only tend to establish or disprove an immaterial or irrelevant fact, it should be excluded.<sup>16</sup> But there are many cases in which such evidence will tend to enlighten the jury upon the issues involved and in which it may be evidence of a very satisfactory and effective character.

**§ 1250. When evidence of experiments is admissible.**—If it is obvious that evidence of experiments will tend to enlighten, rather than to confuse the jury, it should be admitted under proper limitations and restrictions,<sup>17</sup> although, as has already been said, the matter is largely within the discretion of the trial court. Such evidence is, perhaps, most often admitted in connection with the testimony of ex-

<sup>14</sup> *Harrington v. Worcester, &c. St. R. Co.* 157 Mass. 579, 32 N. E. 955; *Winslow v. Morrill*, 68 Me. 362; *State v. Sanders*, 68 Mo. 202; *Garrison v. Ladd Watchcase Co.* 17 R. I. 691; *Forehand v. State*, 51 Ark. 553; *Jim v. State*, 4 Humph. (Tenn.) 289; *Yates v. People*, 38 Ill. 531.

<sup>15</sup> *Indianapolis v. Scott*, 72 Ind. 196; *People v. Boggs*, 20 Cal. 432; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *Stockwell v. Chicago, &c. R. Co.* 43 Iowa, 470. See also, *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812.

<sup>16</sup> *Libby v. Sherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. 191; *Ulrich v. People*, 39 Mich. 253; *State v. Lindoen*, 87 Iowa, 702, 54 N. W. 1075.

<sup>17</sup> *Burg v. Chicago, &c. R. Co.* 90 Iowa, 106, 57 N. W. 680, 48 Am. St. 419; *Clark v. State*, 38 Tex. Cr. App. 30, 40 S. W. 992; *Byers v. Nashville, &c. R. Co.* 94 Tenn. 353; *People v. Levine*, 85 Cal. 39, 22 Pac. 969; *Alabama, &c. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; and numerous authorities cited in the section on illustrative cases.

perts,<sup>18</sup> but it is often admissible in other cases as well. It is usually said, and this is the general rule, that, in order to render such evidence admissible, the conditions and circumstances of the experiment must be the same, or at least substantially similar, to those of the case on trial, and the evidence must be such as is calculated to enlighten and not to confuse the jury.<sup>19</sup> But there are some cases in which it would seem that evidence of experiments under different conditions may be admissible.

**§ 1251. Evidence of experiments—Illustrative cases.**—Evidence of experiments made by a witness outside of court have been held admissible to show that one could or could not have seen that which he testified to have seen,<sup>20</sup> and to show that the plaintiff, in an action against a railroad company for damages on account of personal injuries, was injured by having his foot caught in a switch.<sup>21</sup> So, on a prosecution against the defendant for assault with intent to commit rape, where there was evidence to the effect that he was in a wagon in the rear of three other wagons, and that, after the commission of the crime, he overtook these wagons, it was held on appeal that the trial court erred in refusing to permit him to introduce evidence of experiments tending to show that it would have been impossible for him to have stopped and committed the offense, as claimed by the prosecution, and then to have overtaken the wagons.<sup>22</sup> In another case, on the trial of one indicted for murder, where there was evidence to the effect that the bullet fired by the defendant passed entirely through the head of the deceased, and it became material to determine the relative positions of the defendant and the deceased when the shot was fired, it was held proper to submit the skull of the deceased for the inspection of the jury, and also to show the result of experiments in shooting with defendant's revolver with the same kind of cartridges at blotting pads, for the purpose of ascertaining the distance at which the shot would

<sup>18</sup> *Eidt v. Cutler*, 127 Mass. 522; *Sullivan v. Commonwealth*, 93 Pa. St. 285; *Lewiston Steam Mill Co. v. Androscoggin, &c. Co.* 78 Me. 274, 4 Atl. 555; *State v. Justus*, 11 Ore. 178, 50 Am. R. 470.

<sup>19</sup> Note in 36 Cent. Law Jour. 283; *Lake Erie, &c. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Commonwealth v. Piper*, 120 Mass. 188; *State v. Fletcher*, 24 Ore. 295, 33 Pac. 575; *Commonwealth v. Twit-*

*chel*, 1 Brewst. (Pa.) 556; *Chicago, &c. R. Co. v. Logue*, 47 Ill. App. 292; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283.

<sup>20</sup> *Smith v. State*, 2 Ohio St. 511.

<sup>21</sup> *Brooke v. Chicago, &c. R. Co.* 81 Iowa, 504, 47 N. W. 74. But see *Klanowski v. Grand Trunk R. Co.* 64 Mich. 279, 31 N. W. 275.

<sup>22</sup> *Clark v. State*, 38 Tex. Cr. App. 30, 40 S. W. 992.

burn or powder mark the scalp of the deceased;<sup>23</sup> and there are other authorities to the same effect.<sup>24</sup> But there are some authorities in which evidence of similar experiments was held inadmissible in similar cases.<sup>25</sup>

**§ 1252. Evidence of experiments—Similarity of condition.**—As stated in a preceding section, the general rule is that evidence of experiments is not admissible unless the conditions are practically the same or substantially similar. A very slight difference in the conditions and circumstances might make a very material difference in the result, but the conditions need not be precisely the same in all cases, and the courts are not all in accord as to just how nearly identical or similar the conditions must be. Indeed, as shown by comparing the two Texas cases cited in the last preceding section, the decisions of the courts of the same state do not always seem to be entirely consistent. This is further illustrated by a case in Indiana.<sup>26</sup> In that case the Supreme Court held that evidence of an experiment was admissible notwithstanding there was some difference in the conditions; but, before the case was reported in the state reports, the opinion was withdrawn, and the case was transferred to the Appellate Court, which held that the evidence was not admissible because the conditions were not similar. Additional cases upon the subject will be found in the note below.<sup>27</sup>

<sup>23</sup> *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95.

<sup>24</sup> *State v. Asbell*, 57 Kans. 398, 46 Pac. 770; *State v. Jones*, 41 Kans. 312, 21 Pac. 265; *Sullivan v. Commonwealth*, 93 Pa. St. 284; *Boyd v. State*, 14 Lea (Tenn.) 161, ¶169; *State v. Nagle*, (R. I.), 54 Atl. 1063.

<sup>25</sup> *Morton v. State*, 43 Tex. Cr. App. 533, 71 S. W. 281. See, also, *Hooker v. State* (Md.), 56 Atl. 390; *State v. Fletcher*, 24 Ore. 295, 33 Pac. 575; *State v. Justice*, 11 Ore. 178, 50 Am. R. 470; *Evans v. State*, 109 Ala. 11, 19 So. 535. In *United States v. Ball*, 163 U. S. 662, 673, 16 Sup. Ct. 1192, the defendant on trial for murder introduced evidence that the gun with which the deceased was alleged to have been shot did not scatter shot in the way the

shot was scattered on the person of the deceased, and asked permission to take the gun out and try it. This was refused, and the court on appeal said, "the granting or refusal of such a request first made in the midst of the trial was clearly within the discretion of the court."

<sup>26</sup> *Chicago, &c. R. Co. v. Champion*, 9 Ind. App. 510, 32 N. E. 874, 36 Cent. Law Jour. 280, 36 N. E. 221, 53 Am. St. 357.

<sup>27</sup> Conditions held sufficiently similar to justify the admission of evidence in *Berg v. Chicago, &c. R. Co.* 90 Iowa, 106, 57 N. W. 680, 48 Am. St. 419; *Nosler v. Chicago, &c. R. Co.* 73 Iowa, 268, 34 N. W. 850; *Wilson v. State*, 36 Tex. Cr. App. 452, 36 S. W. 587; *People v. Le-*



The general rule is as we have stated it, namely, that the conditions must be substantially similar, but there is authority for the proposition that, if they are reasonably similar, the lack of entire similarity should go to the weight, rather than to the competency of the evidence.<sup>28</sup> So, as has been already intimated, there are exceptional cases in which a principle may be established that will have an important bearing upon the matter under investigation by experiments made under different conditions.<sup>29</sup> Thus, the same result may be brought about by an experiment under different conditions, and may be of such a nature as to almost conclusively establish or overthrow the theory of the one party or the other.<sup>30</sup>

**§ 1253. Experiments with bloodhounds.**—Although the subject does not fall strictly within the province of this chapter, yet the question of the admissibility of evidence of the actions of bloodhounds in following the track of a supposed criminal is not entirely foreign to the general subject under consideration, and this seems a convenient place in which to treat it. There is no certainty in such evidence. It is really the dog that is the witness, and the evidence would seem to be hearsay in this view, and one court has vigorously maintained, in a very recent case, that such evidence is not admissible.<sup>31</sup> But other courts have agreed that it is admissible under, and only under, sub-

vine, 85 Cal. 39, 22 Pac. 969; Elgin, &c. R. Co. v. Reese, 70 Ill. App. 464; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Davis v. State, 51 Neb. 301, 70 N. W. 984, 1003; Byers v. Nashville, &c. R. Co. 94 Tenn. 345. Conditions held not sufficiently similar in Commonwealth v. Piper, 120 Mass. 185; Klanowski v. Grand Trunk R. Co. 64 Mich. 279, 31 N. W. 275; Lake Erie, &c. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Hawks v. Charlemont, 110 Mass. 110; Commonwealth v. Twitchell, 1 Brewst. (Pa.) 556.

<sup>28</sup> Clark v. State, 38 Tex. Cr. App. 30, 40 S. W. 994; Illinois Cent. R. Co. v. Burns, 32 Ill. App. 196; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938.

<sup>29</sup> See Chicago, &c. R. Co. v.

Champion, 9 Ind. App. 510, 36 N. E. 221, 36 Cent. Law Jour. 280.

<sup>30</sup> See Lincoln v. Taunton Copper, &c. Co. 9 Allen (Mass.) 181; State v. Isaacson, 8 So. Dak. 69, 65 N. W. 430; State v. Jones, 41 Kans. 309. In one case, Schweinfurth v. Cleveland, &c. R. Co. 60 Ohio St. 215, 54 N. E. 89, the jury by agreement of parties went out to view a railroad crossing where the plaintiff's decedent had been killed and to witness certain experiments made with an engine, train and horse and buggy with men seated in the buggy, and it was held that the trial court properly instructed the jury that what they saw should be taken and considered by them as evidence in the cause.

<sup>31</sup> Brott v. State (Neb.), 97 N. W. 593.

stantially the following conditions: Even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be shown by preliminary evidence that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him.<sup>32</sup>

<sup>32</sup> *Pedigo v. Commonwealth*, 103 So. 385, 39 Am. St. 17. See, also, *Ky.* 41, 44 S. W. 143, 82 Am. St. State v. Hall, 1 Ohio Dec. 147, 3 566; *Davis v. State (Fla.)*, 35 So. Ohio N. P. 125; *Simpson v. State*, 76; *Hodge v. State*, 98 Ala. 10, 13 111 Ala. 610, 20 So. 572.

## CHAPTER LIX.

### DOCUMENTARY EVIDENCE.

Sec.	Sec.
1254. Definition of "document."	1257. Extent and meaning.
1255. Documents—Character.	1258. Documents—Admissibility.
1256. Documents and real evidence.	1259. Division—Primary and secondary.

§ 1254. **Definition of "document."**—Documents as instruments of evidence are the media through which certain material and pertinent facts, either disputed or required to be proved, are conveyed to the mind of the judicial tribunal. Documents, therefore, are articles and material substances on which the existence of things is recorded or engraved by conventional marks or symbols.<sup>1</sup> "‘Document’ means any substance having any matter expressed or described upon it by marks capable of being read." And where such documents are produced for the inspection of the court they are called documentary evidence.<sup>2</sup> As defined by one author, documentary evidence is an expression used to denote one of the instruments of evidence.<sup>3</sup> In other words, documentary evidence is evidence supplied by written instruments, or evidence derived from conventional symbols, such as letters, by which ideas are represented on material substances.<sup>4</sup> Documentary evidence is distinguished from personal evidence—and by personal evidence is meant evidence afforded by human beings, either by words or signs intended to convey ideas. In this sense personal evidence

<sup>1</sup> Best Ev. § 123.

<sup>4</sup> Century Dict.; Sweet Law Dict.

<sup>2</sup> Stephen Dig. Ev. 3; Smith Ev. 6. See, also, Vol. I, § 22.

<sup>3</sup> Stephen Ev. 2, 3.

need not be oral, but may be written, as where it is conveyed by affidavit or deposition.<sup>5</sup>

§ 1255. **Document—Character.**—Documents are necessarily inanimate objects, and hence must come to the cognizance of judicial tribunals through human agency, or the medium of human testimony.<sup>6</sup> For this reason in earlier times they were denominated “dead proofs,” in contradistinction to witnesses who were said to be living proofs.<sup>7</sup> A notched stick, by means of which an account was kept, was held to be a document.<sup>8</sup> And where a mechanic kept the account of his daily labors on a shingle, this was properly admitted in evidence as a document.<sup>9</sup> So the wooden scores on which bakers, milkmen and others, indicated by notches the number of loaves of bread, or quarts of milk supplied to their customers, and the old exchequer tallies, were regarded as documents as much as the most elaborate deeds.<sup>10</sup> Documents properly include all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol;<sup>11</sup> although a more accurate definition has been suggested as follows: “‘Document’ means any substance having any matter expressed, as described upon it by means of letters, or figures, or marks, or by more than one of these means.”<sup>12</sup>

A document is any solid substance upon which matters have been expressed or described by conventional signs, with the intention of recording or transmitting that matter. Thus, a piece of paper on which words are written, lithographed, printed or stamped, or expressed by arbitrary signs or ciphers, is a document, and so is a tally, or piece of wood with notches to represent the figures or amounts.<sup>13</sup> So a document is said to be an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings, to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to

<sup>5</sup> Sweet Law Dict.

<sup>6</sup> Best Ev. § 216

<sup>7</sup> Coke Litt 6 b.

<sup>8</sup> Rowland v. Burton, 2 Harr. (Del.) 288.

<sup>9</sup> Kendall v. Field, 14 Me. 30.

<sup>10</sup> Best Ev. § 215.

<sup>11</sup> Best Ev. § 215.

<sup>12</sup> 20 Solicitor's Jour. (Sept. 2, 1876) 856. The difficulty with this

definition is that it refers to the substance on which the matter is written, while all others include the idea that a document is the substance having any matter expressed or described on it, etc.

<sup>13</sup> Sweet Law Dict. Quoted in 9 Am. & Eng. Ency. of Law (2d ed.) 879.

maps and plans.<sup>14</sup> So, also, bark or parchments containing writings are documents in this sense.<sup>15</sup> The word documents, by one court, is said to be a word of a very comprehensive signification, and courts ought not to strive to narrow its signification, but rather to extend it.<sup>16</sup> Photographs of tombstones or houses have been held to be documents,<sup>17</sup> but they are generally in the nature of secondary evidence.<sup>18</sup> So, family portraits, shown to have been recognized and treated as such, have been admitted as evidence in pedigree cases as equivalent to declaratives by members of the family by whom they were so treated.<sup>19</sup>

**§ 1256. Documents and real evidence.**—The distinction between documentary evidence and what most law writers and courts denominate real evidence should be maintained.<sup>20</sup> While in some instances the line of demarkation seems more fanciful than real, nevertheless it seems to exist. A common example of things nearly related, and yet which are usually, though not always, classified as real evidence, and not documentary, is found in models and drawings, as these differ from documents in that they are actual and not symbolical representations.<sup>21</sup>

**§ 1257. Extent and meaning.**—A very comprehensive statement to the extent and meaning of documents and documentary evidence was made by an inferior court as follows: "By documentary evidence is to be understood not merely evidence in writing, but that kind of written evidence which, of itself, proves the fact to be established, and justifies belief in its truth. When it will be regarded as satisfactory will depend upon the nature of the fact to be established and the usages of mankind, or the established rules of law with reference thereto. For example, conveyances of land are evidenced by deeds. Appointments to office by commissioners under the seal of the state; transactions of courts by records; public grants by charter, by letters patent, or by act of assembly or parliament; marriages by certificates of officiating clergymen; transactions between merchants by books of account. In

<sup>14</sup> Wharton Ev. § 614; Smith Ev. 368.

<sup>15</sup> Smith Ev. 368.

<sup>16</sup> Fox v. Sleewan, 17 Ont. Prac. R. 492.

<sup>17</sup> Lyell v. Kennedy, 50 L. T. (N. S.) 730; Fox v. Sleewan, 17 Ont. Prac. R. 492.

<sup>18</sup> See Vol. 1, § 217; Baustian v. Young, 152 Mo. 317, 75 Am. St. 462;

White Sewing Machine Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. 109.

<sup>19</sup> Taylor Ev. (Am. Ed. 1897) § 652.

<sup>20</sup> 1 Best Ev. § 196; Evans v. Evans, 1 Hogg, C. R. 35, 105.

<sup>21</sup> 1 Best Ev. § 215. But see Pool v. Myers, 21 Miss. 466; Guerin v. Hunt, 6 Minn. 375; Hanson v. Armstrong, 22 Ill. 442.

all these, if documentary evidence of the fact be required, it can only be answered by exhibiting the deed itself, the commission, the record, the letters patent, the marriage certificate, or the original book of entries, if within the control of the party; if not within his control, then by authenticated copy, either from some public office when the same is by law authorized to be recorded, or proven by some one who has compared it with the original. But in neither of these cases would a mere written statement by a third person, even though he had seen the original evidence, or had personal knowledge of the fact, be regarded as satisfactory documentary evidence of its existence, nor indeed documentary evidence at all.”<sup>22</sup>

**§ 1258. Documents—Admissibility.**—By the statutes known as the “Documentary Evidence Act,” the rule of admitting in evidence official documents was very broadly extended in England. The statute provided that “Whenever by any Act now in force or hereafter to be in force, and certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceedings, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.”<sup>23</sup>

**§ 1259. Divisions—Primary and secondary.**—Documentary evidence is divided into primary and secondary. Primary evidence is the document itself produced in court for inspection. In case of private documents, a copy of the document, or an oral account of its contents, is secondary evidence, and is not, in the absence of a statute so providing, admissible without laying a proper foundation. But in the case

<sup>22</sup> *Atkins v. Ballauf*, 1 Disney 1845, 8 & 9. V. C. 113; 1 Taylor (Ohio) 382.

Ev. §§ 7, 8.

<sup>23</sup> *Documentary Evidence Act*

of public documents the record is usually considered as primary evidence, and examined or certified copies, or exemplifications, generally must or may be produced in the absence of the documents themselves. Acts of Congress and statutes providing for the exemplification of such documents, and the admission of exemplified or certified copies, also exist in this country.<sup>24</sup>

"Stephen Dig. Ev. XIV.

## CHAPTER LX.

### DOCUMENTS—PRIMARY AND SECONDARY EVIDENCE.

Sec.		Sec.	
1260.	Primary evidence.	1265.	Secondary—Degrees.
1261.	Primary—Why required.	1266.	Secondary—Degrees—Illustrations.
1262.	Primary—Newspapers.	1267.	Secondary—Admissibility.
1263.	Primary—Photographs.	1268.	Secondary—Why excluded.
1264.	Exceptions—Collateral documents.	1269.	Secondary—Burden of Proof.

§ 1260. **Primary evidence.**—The nature of primary evidence has already been explained in a general way,\* but the subject will now be treated more in detail. Primary evidence means the document itself produced for the inspection of the court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called, or an admission of its contents proved to have been made by a person whose admissions are relevant and competent.<sup>1</sup> A party's admissions may be introduced as primary evidence against him, even when such admissions are the contents of a written document.<sup>2</sup> And where a document is executed in counter parts, each part

\* Vol. I, § 208.

<sup>1</sup> Steven Dig. Ev. art. 64; 2 Wharton Ev. §§ 1091, 1093.

<sup>2</sup> Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127; Smith v. Palmer, 6 Cush. (Mass.) 513; Loomis v. Wadhams, 8 Gray (Mass.) 557, 562; Commonwealth v. Wesley, 166 Mass. 248, 44 N. E. 228; Critchton v. Smith, 34 Md. 42; Taylor v. Peck, 21 Gratt. (Va.) 11; 2 Wharton Ev. §§ 1091,

1092; Slatterie v. Pooley, 6 M. & W. 664. See, also, Hoefling v. Hambleton, 84 Tex. 517, 19 S. W. 689; Edgar v. Richardson, 33 Ohio St. 581; Cumberland Mut. F. Ins. Co. v. Giltman, 48 N. J. L. 495; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325. But compare 1 Greenleaf Ev. (older editions) § 596; Lawless v. Quele, 8 Ir. L. R. 382; Jenner v. Jolliffe, 6 Johns. (N. Y.) 9; Welland



is regarded as primary evidence. Thus it was held in an early case that proof by the lessor of the counter part of a lease held by him, by the subscribing witness, was sufficient proof of the holding upon the condition therein stipulated.<sup>3</sup> So, where a number of copies are printed from an original manuscript by a common press, each is regarded as primary evidence.<sup>4</sup> And a component part of a contract in the handwriting of one of the contracting parties, and not signed by him, but delivered to the other party, was held to be original evidence sufficient to charge the party by whom it was made.<sup>5</sup> So, where contracts are executed in duplicate, each is primary evidence, and notice to produce the duplicate is not required.<sup>6</sup> But this rule was held not to apply to a copy of a letter where the copies had been taken by a letter-copying machine.<sup>7</sup>

§ 1261. **Primary—Why required.**—The rule requiring the production of the best evidence of which the nature of the case is susceptible does not demand the greatest amount of evidence which can be given on the question in issue, but the design of the rule is to prevent the introduction of any evidence where, from the nature of the case, the law presumes or the proofs show that the party seeking to introduce it has in his possession or under his control better evidence. The object of the rule requiring the best evidence which the case in its nature is susceptible is for the prevention of fraud, and where the proofs show or the law presumes that the party has better evidence in his possession or under his control, the presumption is that he withholds it from some sinister motive or for some advantageous purpose, and that if produced it would in some manner be against his interest, and therefore the rule forbids the introduction of secondary evidence so long as the original and primary evidence can be had; accordingly, the extent of the rule is to exclude such evidence as indicates the existence of the original sources.<sup>8</sup> The distinction between primary and

*Canal v. Hathaway*, 8 Wend. (N. Y.) 480; *Haliburton v. Fletcher*, 22 Ark. 453; *Fox v. People*, 95 Ill. 71; *Grimes v. Fall*, 15 Cal. 63.

<sup>3</sup> *Roe v. Davis*, 7 East. 362; *Burleigh v. Stibbs*, 5 Tenn. 465; *Carlisle v. Blamere*, 8 East. 487; *Paul v. Meek*, 2 I. & J. 116; *Houghton v. Koenig*, 18 C. B. 235; *Stowe v. Querner*, L. R. 5 Exch. 155.

<sup>4</sup> *Rex v. Watson*, 2 Starkie, 104, 111, 32 Howard St. Tr. 82.

<sup>5</sup> *Carroll v. Peake*, 26 U. S. (1 Pet.) 10.

<sup>6</sup> *Cleveland, &c. R. Co. v. Perkins*, 17 Mich. 296; *Colling v. Treweek*, 6 B. & C. 398; *Totten v. Bucy*, 57 Md. 446, 1 Taylor Ev. p. 425, § 396, 1 Greenleaf Ev. § 558.

<sup>7</sup> *Nodin v. Murray*, 3 Campb. 228. See, also, *Haas v. Chubb* (Kans.), 74 Pac. 230; vol. I, § 208.

<sup>8</sup> *U. S. Sugar Refinery v. Edward P. Allis Co.* 9 U. S. App. 550;

secondary evidence is one of law, and accordingly the law excludes the secondary evidence until the loss or non-existence of the primary evidence is shown. The rule, therefore, relates to the quality, and not to the strength or weight of the evidence. The rule requiring the production of the best evidence is limited to cases where there is made to appear, or is presumed to exist, primary as well as secondary evidence. It is very clear that secondary evidence, when admitted, might have the same weight with a judicial tribunal as the primary evidence.<sup>9</sup> In many instances evidence that is usually regarded as secondary may become primary. When it is shown that the original writing or document, or what would naturally be the primary evidence, has been lost, then resort is had to parol proof of the contents of such document or writing, and in such cases the parol proof, which ordinarily is secondary evidence, becomes primary; or, as has been otherwise stated, "Evidence which carries on its face no indication that better remains behind is not secondary, but primary."<sup>10</sup>

§ 1262. **Primary—Newspapers.**—Copies of newspapers printed and circulated are primary evidence, and sufficient in libel cases.<sup>11</sup> So, in other cases, newspapers may be admissible as evidence of the fact of publication, notice, or the like.<sup>12</sup> But as to recitals of a transaction they are not only, as a rule, secondary evidence, in one sense, but are also obnoxious to the hearsay rule.<sup>13</sup>

§ 1263. **Primary—Photographs.**—Photographs stand on the footing as maps, diagrams or plans, and are regarded as legitimate modes of proving a condition or situation which can be shown by a representation of that kind. Their correctness rest, to some extent, upon the credit of the witnesses, in the same manner as a map, or plan, or other drawing, but this is no reason for excluding it as evidence. Either party may support it or impeach its correctness as an exact representation of the situation or condition in controversy.<sup>14</sup> The preliminary proof of the correctness of a photograph, the ability of the operator

Shoenberger v. Hackman, 37 Pa. St. 87.

<sup>9</sup> U. S. Sugar Refinery v. Edward P. Allis Co. 9 U. S. App. 550.

<sup>10</sup> 1 Greenleaf Ev. § 84; Jelks v. Barrett, 52 Miss. 315. See Dillon v. Howe, 98 Mich. 168, 57 N. W. 102.

<sup>11</sup> Duke of Brunswick v. Harmer, 68 E. C. L. (14 Ad. & E.) 185. See,

also, vol. I, §§ 322, 323; State v. McKee, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542.

<sup>12</sup> Vol. I, § 419.

<sup>13</sup> Vol. I, §§ 208, 419.

<sup>14</sup> Lake Erie, &c. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Commonwealth v. Morgan, 159 Mass. 375, 34 N. E. 458; Alberti v. New York, &c.

and the accuracy of his instruments is usually addressed to the court. It has also been held that a photograph may properly be excluded when it is shown that it was taken a long time after the accident or the occurrence of the subject matter of the controversy, and the situation has materially changed, or where the operator is shown to be inexperienced.<sup>15</sup> The rule laid down in Massachusetts is broadly that a plan or picture, whether made by hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case.<sup>16</sup> The preliminary proof is usually a question of fact to be determined by the court.<sup>17</sup> Where the original of a forged note was so dim it could not be read, it was held proper to introduce a photographic copy of same on proof that it is an exact copy of the note, not for the purpose of proving the signatures nor the handwriting, but to prove the original words of the note.<sup>18</sup> But the rule is that photographic copies of instruments sued on can only be used as secondary evidence.<sup>19</sup>

R. Co. 118 N. Y. 76, 23 N. E. 35; Chicago, &c. R. Co. v. Lawrence, 96 Ill. App. 635; Fitzgerald v. Hedstrom, 98 Ill. App. 109; Wabash R. Co. v. Prast, 101 Ill. App. 167; Ruloff v. People, 45 N. Y. 213; Udderzook v. Commonwealth, 76 Pa. St. 340; Church v. Milwaukee, 31 Wis. 512; Cozzen v. Higgins, 1 Abbott (N. Y.) 451; Locke v. S. S. C. & P. R. Co. 46 Iowa, 109; Sterling v. City of Detroit (Mich.), 95 N. W. 986. But, in a recent case, where a photograph was introduced merely to identify a dead person, it was held that it need not be shown by whom and under what circumstances it was taken. Lamb v. State (Neb.), 95 N. W. 1050, 1052. See, also, Louisville, &c. R. Co. v. Hall, 91 Ala. 112, 24 Am. St. 863.

<sup>15</sup> Cleveland, &c. R. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869; Lake Erie, &c. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Chicago, &c. R. Co. v. Corson, 190 Ill. 98; Hampton v. Norfolk, &c. R. Co. 120 N. Car. 534, 27 S. E. 96. But see Dyson v. New York, &c. R. Co. 57

Conn. 9, 17 Atl. 137, 14 Am. St. 82; Beardslee v. Columbia Tp. 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. 883; Diedricks v. Salt Lake City R. Co. 14 Utah, 137, 46 Pac. 656.

<sup>16</sup> Marcy v. Barnes, 16 Gray (Mass.) 161; Hollenbeck v. Rowley, 8 Allen (Mass.) 473; Blair v. Pelham, 118 Mass. 420; Randall v. Chase, 133 Mass. 210. See, also, note in 75 Am. St. 468, 479; Mow v. People, 31 Colo. 351, 72 Pac. 1069.

<sup>17</sup> Commonwealth v. Coe, 115 Mass. 481; Walker v. Curtis, 116 Mass. 98; Van Houten v. Morse, 162 Mass. 414, 44 Am. St. 373; Blair v. Inhabitants of Pelham, 118 Mass. 420; Goldboro v. Central R. Co. 60 N. J. L. 49, 52, 37 Atl. 433; McGar v. Bristol, 71 Conn. 652, 42 Atl. 100.

<sup>18</sup> Duffin v. People, 107 Ill. 113.

<sup>19</sup> Ebom v. Zimpelman, 47 Tex. 503; Howard v. Illinois, &c. Bank, 189 Ill. 568, 59 N. E. 1106; White Sewing Machine Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. 109. See United States v. Ortiz, 176 U. S. 422, 20 Sup. Ct. 466.

§ 1264. **Exceptions—Collateral documents.**—An exception to the rule requiring the production of the best evidence and proof of the contents of a written instrument by the introduction of the writing itself, is usually said to be found in cases where the document or written agreement is purely collateral to the main question, although it might better be said that there are cases in which the rule does not apply. In such cases the production of the writing is not required, and parol proof of its contents may be made without any proof of the loss of the instrument.<sup>20</sup>

§ 1265. **Secondary—Degrees.**—The earlier English cases, and perhaps the English cases generally, establish the rule that the law makes no distinction between one class of secondary evidence and another; in other words, that there are no degrees of secondary evidence. But, very strangely, some of the cases announcing such rule admit that, if a party giving parol evidence of a lost instrument appears to have better secondary evidence in his power which he does not produce, such fact may go to the jury, from which a presumption may sometimes arise that the evidence so kept back would be adverse to the party holding it.<sup>21</sup> The English rule is followed by a few

<sup>20</sup> *Shoenberger v. Hackman*, 37 Pa. St. 87; *Bayne v. Stone*, 4 Esp. 13; *Tucker v. Welsh*, 17 Mass. 160; *McFadden v. Kingsberry*, 11 Wend. (N. Y.) 667; *Southwick v. Stephens*, 10 Johns. (N. Y.) 443; *Scullin v. Harper*, 78 Fed. 460; *Foster v. Cleveland, &c. R. Co.* 56 Fed. 434; *Andrews v. Creegan*, 7 Fed. 477; *Foxworth v. Brown*, 120 Ala. 59; *Bunzel v. Maas*, 116 Ala. 68; *Winslow v. State*, 76 Ala. 42; *Street v. Nelson*, 67 Ala. 504; *East v. Pace*, 57 Ala. 521; *Triplett v. Rugby Distilling Co.* 66 Ark. 219; *Carter v. Pomeroy*, 30 Ind. 438; *Stanley v. Sutherland*, 54 Ind. 339; *Hazzard v. Duke*, 64 Ind. 220; *Uhl v. Moorhous*, 137 Ind. 445; *Lipscomb v. Citizens' Bank (Kans.)*, 71 Pac. 583; *Lamb v. Moberly*, 3 T. B. Mon. (19 Ky.) 179; *Phinney v. Holt*, 50 Me. 570; *Ayers v. Hewett*, 19 Me. 281; *Tuck-*

*er v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Gilbert v. Duncan*, 29 N. J. L. 133; *Fairchild v. Fairchild*, 64 N. Y. 471; *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667; *Cullinan v. Furthmann*, 70 N. Y. App. Div. 110; *Engel v. Eastern Brewing Co.* 19 Misc. (N. Y.) 632; *Daniels v. Smith*, 130 N. Y. 696; *Sommer v. Oppenheim*, 19 Misc. (N. Y.) 605; *Archer v. Hooper*, 119 N. Car. 581; *Carden v. McConnell*, 116 N. Car. 875; *Belding v. Archer*, 131 N. Car. 287; *Elrod v. Cochran*, 59 S. Car. 467; *Conner v. State*, 23 Tex. App. 378; Vol. I, § 216, where many illustrations are given. See § 1442.

<sup>21</sup> *Doe v. Ross*, 7 M. & W. 102; *Rowlandson v. Wainright*, 1 Nev. & Per. 8; *Coyle v. Cole*, 6 Car. & P. 359; *Rex v. Hunt*, 3 B. & Ald. 506; *Brown v. Woodman*, 6 Car. & P. 206; *Hall v. Ball*, 3 Scott N. R. 577.

American cases.<sup>22</sup> The rule established, and clearly deducible from the majority of American authorities, however, as to secondary evidence, is the same in effect as the rule between primary and secondary evidence; that is, that when secondary evidence is properly admissible, it must itself be the best that in the nature of the case can be produced, or the best kind of that character of evidence which appears to be in the power of the party to produce.<sup>23</sup> The rule applies in all cases where it is made to appear that there is secondary evidence which, in its nature and character, is better than the evidence offered, and that it is in the power of the party to produce it. But it has also been held that the party may be permitted to show that what appears to be secondary evidence of a higher degree is not so in fact, and thereby make a lower degree of secondary evidence proper and admissible.<sup>24</sup> Mr. Starkie himself distinctly recognizes this order in the rank of evidence where he says: "After proof of the due execution of the original, the contents should be proved by means of a counterpart, if

<sup>22</sup> *Carpenter v. Dame*, 10 Ind. 125; *Stetson v. Gulliver*, 56 Mass. (2 Cush.) 494; *Goodrich v. Weston*, 102 Mass. 362, 3 Am. R. 469; *Smith v. Brown*, 151 Mass. 338; *Commonwealth v. Smith*, 151 Mass. 491; *Allerkamp v. Gallagher*, 24 S. W. 372; *Lewis v. San Antonio*, 7 Tex. 288.

The supreme court of Nebraska, following the English rule, says: "When the primary is not obtainable, a party may resort to any evidence otherwise competent; and his choice of one class of secondary evidence instead of another goes to the weight of the evidence and not to its admissibility." *Rawlings v. Young Men's Christian Asso.* 48 Neb. 216. See, also, vol. I, § 209.

<sup>23</sup> *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581; *United States v. Britton*, 2 Mason (U. S.) 464; *Kello v. Maget*, 18 N. Car. (1 Dev. & B.) 414; *Den v. McAllister*, 7 N. J. L. 46; *Harvey v. Thorpe*, 28 Ala. 250; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Illinois Land, &c. Co. v. Bonner*, 75 Ill. 315; *Durkee v. Vermont, &c. R. Co.*

29 Vt. 127; *Stevenson v. Hoy*, 43 Pa. St. 191; *Ellis v. Huff*, 29 Ill. 449; 1 *Greenleaf Ev.* 509; *Curry v. Robinson*, 11 Ala. 266; *Georgia Pac. R. Co. v. Propst*, 90 Ala. 1; *Mariner v. Saunders*, 10 Ill. 113; *Protection L. Ins. Co. v. Dill*, 91 Ill. 174; *Mercier v. Harnan*, 39 La. Ann. 94; *Phillips v. U. S. Benevolent Society*, 125 Mich. 186; *Windon v. Brown*, 65 Minn. 394; *Aurora Bank v. Linzee*, 166 Mo. 496; *Rice v. Rice* (N. J.), 25 Atl. 321; *Dumas v. Powell*, 3 Dev. L. (14 S. Car.) 103; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Williams v. Waters*, 36 Ga. 454; *Goodman v. Henderson*, 58 Ga. 567; *Cleveland, &c. R. Co. v. Newlin*, 74 Ill. App. 638; *Redd v. State*, 64 Ark. 475, 47 S. W. 119; *Bowden v. Achor*, 95 Ga. 243; *Horseman v. Todhunter*, 12 Iowa, 230; *Graham v. Campbell*, 56 Ga. 258; *Williams v. Waters*, 36 Ga. 454; *Nason v. Jordan*, 62 Me. 480; *Smith v. Axtell*, 1 N. J. L. 494. See, also, Vol. I, § 209.

<sup>24</sup> *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344.

there be one, for this is the next best evidence, and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced, although such counterpart was not stamped. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy from having compared it with the original. If there be no copy, the party may produce an abstract, or give in evidence a deed executed by the adversary, in which the instrument is recited, or even give parol evidence of the contents of the deed."<sup>25</sup> Where secondary evidence is admissible, and the rule recognizing different degrees of secondary evidence prevails, it is the duty of the party to produce the best evidence that he has in his power, but in all instances each case must depend in a great measure upon its own circumstances.<sup>26</sup>

§ 1266. **Secondary — Degrees — Illustration.**—The majority rule requiring the highest degree of secondary evidence is more readily understood by its application to the illustrations. Thus, an offer to prove the contents of a letter by parol was held to be properly rejected where it appeared from the proofs that the plaintiffs had in their possession a fac-simile of the original letter which they did not produce for the reason that this was better evidence than the recollection of the witness.<sup>27</sup> In another case, where it appeared that there was an examined copy of an instrument in the possession of the party, it was held to be better evidence as to the proof of the contents of the writing than the uncertain memory of witnesses. The court in this case stated that the same reasons which would require the production of the original, if in the control of the party, would operate in favor of the production of the fac-simile, or of the examined copy. And in another case already cited, where it appeared that the witness had made a verified copy of the document, it was held that such copy was admissible in preference to a professed full recollection of the contents by the witness, for the reason that such copy is less liable to error than the memory of the witness.<sup>28</sup> In another case, following the principle established by Mr. Starkie's rule, it is said, "If, therefore, an instrument is to be proved, the original, if in the possession

<sup>25</sup> Starkie Ev. 341. For a discussion of the question as to whether there are degrees of secondary evidence, see 4 Monthly Law Mag. 265.

<sup>26</sup> Renner v. Bank, &c. 9 Wheat.

(U. S.) 581; *Mandeville v. Reynolds*, 68 N. Y. 528.

<sup>27</sup> *Stevenson v. Hoy*, 43 Pa. St. 191.

<sup>28</sup> *Kello v. Maget*, 18 N. Car. 414.

or control of the party, is to be produced; if the original be lost or destroyed or in the possession of the opposite party who refuses to produce it, an examined copy, if any such exists and can be found, is the next best evidence and must be produced. If no such copy exists then the contents may be proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents."<sup>29</sup> It was held in another case that parol proof as to the contents of a will was not admissible where it was shown that the party offering the proof had in his possession a true copy of the will, in the absence of any evidence accounting for the non-production of the copy.<sup>30</sup> But a copy of a letter sworn to be correctly made from a press copy has been held admissible to prove its contents as secondary evidence without producing the press copy.<sup>31</sup> A copy of a paper or an account used at a former trial is not admissible where the original is within reach.<sup>32</sup> While payment may be proved by parol, the contents of a written order or other document showing payment has been held to come within the rule that the original must be accounted for.<sup>33</sup>

**§ 1267. Secondary—Admissibility.**—Avoiding as much as possible a repetition of the rule stated in a former section,<sup>34</sup> the object now is to give in full detail the rules as to the admissibility of secondary evidence and the methods of its introduction. Keeping in mind the rule previously stated, to the effect that secondary evidence is not admissible, in the first instance it will be found that certain preliminary steps must be taken in order to render it competent and to justify its introduction as evidence.

**§ 1268. Secondary—Why excluded.**—The rule excluding secondary evidence arises either from the fact or the presumption of law that the primary evidence is in existence; hence when it is made to appear that such primary evidence does not exist, then the reason of the rule is abrogated and the rule itself fails; and the secondary evidence is not only admitted, but it then becomes the real primary evidence. The rule excluding secondary evidence does not operate in

<sup>29</sup> *United States v. Britton*, 2 Mason, 464; *Commonwealth v. Snell*, 3 Mass. 82.

<sup>30</sup> *Illinois Land, &c. Co. v. Bonner*, 75 Ill. 315.

<sup>31</sup> *Goodridge v. Weston*, 102 Mass. 362.

<sup>32</sup> *Belknap v. Wendell*, 31 N. H. 92.

<sup>33</sup> *Chambers v. Hunt*, 22 N. J. L. 552.

<sup>34</sup> See Vol. I, § 211.

any case to exclude evidence entirely or merely because it is not all nor the most satisfactory which might be adduced; nor is the rule violated when the evidence which is offered and that which is withheld or otherwise shown to exist is all of the same quality or grade. The rule relates not to the same measure or quantity of evidence, but to the quality. As otherwise stated, "Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed."<sup>35</sup> But the rule remains that where it clearly appears from the proofs or when the law presumes the existence of better evidence or evidence of a superior nature, then all secondary evidence is excluded.<sup>36</sup> The mere selection of weaker instead of stronger proof would not justify the exclusion of the former when, in its nature, it is primary and relevant.<sup>37</sup>

The exclusion of secondary evidence applies not only to instruments required by law to be in writing, but as well to the evidence of any written contract which, by a private compact or agreement of the parties, has been put in writing; nor can such secondary evidence be substituted for any writing, the existence of which is disputed, and which is material to the issue between the parties. It is only, in general, where the writing is wholly collateral to the question in issue that there is any exception to the rule.<sup>38</sup>

But where it is physically impossible to produce the original, as in case of inscription on walls, monuments, tablets, gravestones, surveyors' marks on trees or stones, secondary evidence may be given;<sup>39</sup> and secondary evidence may be given to show inscriptions on banners, flags and the like.<sup>40</sup>

<sup>35</sup> 1 Phillips Ev. 568 n, 570; Powell Evidence, 40; Richardson v. Milburn, 17 Md. 67; Chenery v. Stevens, 97 Mass. 77; Young v. Mertens, 27 Md. 115.

<sup>36</sup> Lee v. Lee, 9 Pa. (Barr) 169; Shoenberger v. Hackman, 37 Pa. St. 87.

<sup>37</sup> 1 Greenleaf Ev. § 82; McCreary v. Turk, 29 Ala. 244.

<sup>38</sup> Creed v. White, 11 Humph. (Tenn.) 549. See § 1264.

<sup>39</sup> North Brookfield v. Warren, 16 Gray (Mass.) 171; State v. Credle, 91 N. Car. 640; Stearns v. Doe, 12

Gray (Mass.) 482, 74 Am. Dec. 608; Kansas, &c. R. Co. v. Miller, 2 Colo. 442; Mortimer v. McCallan, 6 M. & W. 58; Sayer v. Glassop, 2 Exch. 409; Bruce v. Nichlopulo, 11 Exch. 129; Jones v. Tarleton, 9 M. & W. 675; Rex v. Fursey, 6 Car. & P. 84, 25 E. C. L. 294; Doe v. Cole, 6 Car. & P. 360, 25 E. C. L. 438; Shrewsbury v. Peerage, 7 H. L. Cas. 1; Bartholomew v. Stephens, 8 Car. & P. 728-734, E. C. L. 605.

<sup>40</sup> Rex v. Hunt, 3 B. & A. 566, 5 E. C. L. 377.



If the document is in the form of a portable notice, then it must be introduced or its absence accounted for.<sup>41</sup>

§ 1269. **Secondary—Burden of proof.**—When secondary evidence becomes properly admissible under the proofs in a case, it is the duty of the party under the majority rule given to offer the best within his power. But when the existence of better evidence than that offered does not appear the presumption naturally is that the party is offering his best evidence, and a prima facie case is made for the introduction of such secondary evidence as he may possess; if the opposite party objects to the introduction of the secondary evidence offered, the burden is then upon him to show the existence of such better evidence. The rule is aptly stated as follows: "Where satisfactory proof is made of loss or inability to produce an instrument which the law does not make provision for recording and keeping, and the evidence fails to disclose the existence of any copy or other evidence better than parol, known to the party and within his power to produce, and there is nothing appearing to indicate a copy, or fraud or deception, then the presumption arises that there is no copy or other evidence better than parol within the power of the party to produce, and a prima facie case is made for the admission of parol testimony of the contents of the instrument, and such testimony will be admitted unless the objecting party will produce the better evidence or show that it does exist and was known to and might have been produced by the offering party."<sup>42</sup>

<sup>41</sup> Jones v. Tarleton 9 M. & W. 111, 74 Ill. App. 638; Conger v. Converse, 9 Iowa, 554; Curry v. Robinson, 11 Ala. 266.

<sup>42</sup> Cleveland, &c. R. Co. v. New-

## CHAPTER LXI.

### DOCUMENTS OF PUBLIC NATURE—GENERAL PRINCIPLES.

Sec.	Sec.
1270. Written Instruments — Classification.	1274. Admissibility—Legality.
1271. Documents—Public.	1275. Documents of semi-public nature.
1272. Documents of a public nature—Admissibility.	1276. Recitals in private statutes.
1273. Public records — Classification and admissibility.	1277. Recitals in public documents —Effect as evidence.
	1278. Recitals in private writings.

§ 1270. **Written instruments — Classification.** — When classified with reference to their nature, the execution or compilation and their production for use as evidence, written instruments have been divided into the following classes: 1. Public. 2. Private. 3. Partly public or partly private or quasi-public documents. This is regarded as a natural classification and was adopted by earlier law writers and has generally been followed and maintained.<sup>1</sup> In respect to their nature these instruments are further classified as judicial and non-judicial. With a view to the means of making proof of their contents they are also said to be either of record or not of record.<sup>2</sup> The character and admissibility in evidence generally of such written instruments have been treated in a former volume in a general way; the treatment proposed in this and following chapters will be confined chiefly to the methods of preparing such instruments for use as evidence and the production and introduction as such on the trial causes.<sup>3</sup>

§ 1271. **Documents—Public.**—Books and documents in the cus-

<sup>1</sup> Starkie Ev. 255; 1 Greenleaf Ev. § 470.

<sup>2</sup> Starkie Ev. 255; 1 Greenleaf Ev. § 470.

<sup>3</sup> See Vol. I, §§ 404-420.

tody of public officers acting under statutory duties are public records, and consequently do not come within the rule regarding the production, or the accounting for the non-production of ordinary documents and papers. The reasons of the rule are founded in the inconvenience that would result from the frequent removal of public documents; the misapplication of the use of such public documents by their removal from the place where the public have a right to see and inspect them; and the absence of such originals affords no presumption of fraud because they are equally accessible to all parties. For these and other reasons certified or examined copies of all such documents are generally admissible in evidence without accounting for the original.<sup>4</sup>

The court, however, may have the power to compel a custodian of public documents within its jurisdiction to produce such documents in court for inspection and to be used as evidence, and this power should undoubtedly be exercised when it is made to appear that from any special reasons the presence of such documents is essential to the ends of justice, but under ordinary circumstances a court would not exercise such power, as certified copies would be sufficient.<sup>5</sup>

By the statutes of the several states where private writings are recorded and kept in public records, certified copies of such records are admissible in evidence without producing the original.<sup>6</sup>

**§ 1272. Documents of a public nature—Admissibility.**—The admissibility and the rules for the introduction in evidence of public documents are based on ideas of public necessity and convenience;

<sup>4</sup> Coons v. Renick, 11 Tex. 134; Dunham v. City of Chicago, 55 Ill. 357.

<sup>5</sup> Dunham v. City of Chicago, 55 Ill. 357.

<sup>6</sup> Glover v. Hill, 85 Ala. 45; Woodstock Iron Co. v. Roberts, 87 Ala. 436; Ross v. Goodwin, 88 Ala. 390; Hammond v. Blue, 132 Ala. 337; Canfield v. Thompson, 49 Cal. 210; Gethin v. Walker, 59 Cal. 502; Eltzroth v. Ryan, 91 Cal. 584; Bell v. Kendrick, 25 Fla. 778; Stinson v. Geer, 42 Kans. 520; Kenasha Stone Co. v. Shedd, 82 Iowa, 540; Webster v. Calden, 55 Me. 165; Stetson v.

Gulliver, 2 Cush. (Mass.) 494; Eaton v. Campbell, 7 Pick. (Mass.) 10; Lock v. Jayne, 39 Miss. 157; Crispen v. Hannavan, 72 Mo. 548; Hammond v. Johnston, 93 Mo. 198; Hammond v. Gordon, 93 Mo. 223; Garfield, & Co. v. Hammond, 6 Mont. 53; Grand Forks, & c. Church, v. Fadden, 8 N. Dak. 162; Stanley v. Smith, 15 Ore. 505; Curry v. Raymond, 28 Pa. St. 144; Connor v. Corson, 13 S. Dak. 550; Vandergriff v. Pierson, 59 Tex. 371; Chenoweth v. County Court, 32 W. Va. 628; Dick v. Balch, 8 Pet. (U. S.) 30; Campbell v. Lac. lede Gas Co. 119 U. S. 445.

these documents are usually admitted in evidence without the sanctity of an oath or the test of cross-examination into the power or authority of the person on whom their truthfulness may depend. "The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Those who are employed to act in making the memorials are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses upon oath."

**§ 1273. Public records — Classification and admissibility.**—The general, if not the universal, rule is that public records of an official character, or duly certified copies thereof, are admissible in evidence whenever the contents are material and relevant to the issues in the trial of the cause. Such records may be divided into four classes, the contents of which are so admissible without discrimination. 1. Records required to be kept by a particular public officer designated for that purpose. 2. Records specifically required by law to be kept. 3. Records designated for certain purposes and in which certain specified things are to be recorded. 4. Records kept by a public officer in the discharge of official duties. It is not always essential to their admissibility that they are required by statute to be kept; but it is usually sufficient that they are kept by an officer in the discharge of his duty, nor is it necessary that the nature of the office should render the keeping of the book indispensable. It is sufficient even where the record is kept pursuant to the direction of a superior officer, when done in the performance of official public duty. When the record is kept in the discharge of public and official duty it answers the requirement.<sup>8</sup> But while such records are admissible it must be noted

<sup>7</sup> Starkie Ev. 273. See § 406; Slane Peerage, 5 Clark & F. 23; People v. Denison, 17 Wend. (N. Y.) 312.

<sup>8</sup> Evanston v. Gunn, 99 U. S. 660; Sandy White v. United States, 164 U. S. 100 Sup. Ct; Daly v. Webster,

that they are generally only presumptive or *prima facie* evidence of the matters contained, and such proof may be rebutted.

§ 1274. **Admissibility—Legality.**—A record or document will not necessarily be admitted in evidence merely because it purports to be a record of some public matter, or because it may bear on its face some impress of its correctness.<sup>9</sup> The first and fundamental rule is that the document must be proved to be that which it purports to be, and for which it is offered, by some extrinsic proof; it may be true to a certain extent that a record proves itself, but this is after it has been proved to be the record; usually this is true by showing that such a document came from the legal custody or repository; this is regarded as sufficient where the original itself is produced.<sup>10</sup> But a record made out under the direction of a public officer, pursuant to duties enjoined by law, is competent evidence<sup>11</sup> in a proper case.

A record not required by law to be kept, and not declared by law to be evidence, and not kept as a public record in the course of official duty, is not admissible to prove its contents regardless of its public nature.<sup>12</sup> It is not necessary, however, that the law specifically designate that a particular book shall be kept by a certain public

1 U. S. App. 573; *Galt v. Galloway*, 4 Pet. (U. S.) 332; *Bryan v. Glass' Securities*, 2 Humph. (Tenn.) 390; *Bissell v. Hamblin*, 6 Duer. (N. Y.) 512; *Thornton v. Campton*, 18 N. H. 20; *Hempton v. State*, 111 Wis. 127; *Kyburg v. Perkins*, 6 Cal. 674; *Bell v. Kendrick*, 25 Fla. 778; *Groesbeck v. Seeley*, 13 Mich. 329; *Kennedy v. Doyle*, 10 Allen (Mass.) 162; *Trammell v. Trammell*, 17 Ark. 203; *Smith v. Lawrence*, 12 Mich. 431; *Newell v. McLarney*, 49 Mich. 232; *People v. Denison*, 17 Wend. (N. Y.) 312; *Catlet v. Pacific Ins. Co.* 1 Wend. (N. Y.) 561; *Peck v. Farrington*, 9 Wend. (N. Y.) 44; *Bouchaud v. Dias*, 3 Den. (N. Y.) 238; *Highsmith v. State*, 25 Tex. Supp. 137; *People v. Bercham*, 12 Cal. 50; *Sanborn v. School Dist.* 12 Minn. 17; *Roukendorff v. Taylor*, 4 Pet. (U. S.) 349, 360; *Thornton v. Compton*, 18 N. H. 20.

<sup>9</sup> *Starkie Ev.* (Pt. 2.) § 56; *Dist. of Columbia v. Johnson*, 1 Mackey (U. S. C. C.) 51; *Elliott v. McClelland*, 17 Ala. 206.

<sup>10</sup> *People v. Denison*, 17 Wend. (N. Y.) 312; *Bouchaud v. Dias*, 3 Den. (N. Y.) 238; *Downer v. Smith*, 24 Cal. 122; *Donner v. Palmer*, 31 Cal. 500; *Blan v. Smith*, 20 N. H. 461.

<sup>11</sup> *Painter v. Hall*, 75 Ind. 208; *Lefever v. Johnson*, 79 Ind. 554; *Wells v. State*, 22 Ind. 241; *State v. Sutton*, 99 Ind. 300; *Fauks v. Ray*, 1 Wis. 108; *Ordway v. Conroe*, 4 Wis. 45.

<sup>12</sup> *Smith v. Lawrence*, 12 Mich. 431; *Newell v. McLarney*, 49 Mich. 232; *Haile v. Palmer*, 5 Mo. 403; *Herndon v. Casiano*, 7 Tex. 322; *Paschae v. Perez*, 7 Tex. 348; *Highsmith v. State*, 25 Tex. 137; *Hatchett v. Conner*, 30 Tex. 104

officer to make it admissible, but it is sufficient if it appears that the duties of a public officer could not be adequately performed without his keeping a permanent record, and such a record when so kept will be considered as an official book and admissible in evidence<sup>13</sup> when material and relevant.

§ 1275. **Documents of semi-public nature.**—The objection to the introduction in evidence of documents and papers that are not really classed as public documents, is usually placed upon the ground that such records are not made by a public officer; or that if made by a public officer they are not made under authority of law, or that there is no law authorizing such records to be used in evidence. As one answer to these objections it may be said that many records are properly admissible in evidence without the aid of any statute expressly authorizing their admission. These objections are well answered by Justice Strong, in a United States Supreme Court case on the admissibility of a record kept by the U. S. Signal Service at Chicago, where he says: "It may be admitted that there is no statute expressly authorizing the admission of such a record as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent, and at other points in the states and territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide in the system of observations and reports in charge of the chief signal officers of the army for such stations, reports and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept

<sup>13</sup> Groesbeck v. Seeley, 13 Mich. 410, 73 Pac. 156; Chicago, &c. R. 329. See Vol. I, §§ 404-413. See, Co. v. Zapp, 209 Ill. 339, 70 N. E. also, Hesser v. Rowley, 139 Cal. 623.

for public purposes, and so important before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence that official registers or records kept by persons in public office in which they [are] required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him."<sup>14</sup>

This class of evidence is neither necessarily nor strictly confined to facts within the personal knowledge of the officer or person making the document or record.<sup>15</sup> But while such records are admissible in evidence, and are competent to prove the facts recorded, yet, at most, they are only *prima facie* evidence of such facts, and are not conclusive.<sup>16</sup>

**§ 1276. Recitals in private statutes.**—A different rule obtains with reference to recitals in private statutes. This rule, with its reasons, has been best stated in an early Kentucky case: "The facts recited in the preamble of a private statute may be evidence between the commonwealth and the applicant, or the party for whose benefit the act passed. But as between the applicant and another individual

<sup>14</sup> *Evanston v. Gunn*, 99 U. S. 660. See, also, *Galt v. Galloway*, 4 Pet. (U. S.) 332; *Clicquot's Champagne*, 3 Wall. (U. S.) 114; *Gurney v. House*, 9 Gray (Mass.) 404; *DeArmond v. Neasmith*, 32 Mich. 232; *Catharine Maria, The L. R.* 1 Ad. & Ec. 53; *Sandy White v. United States*, 164 U. S. 100; *Daly v. Webster*, 56 Fed. 483; *Standard El. Co. v. Crane El. Co.* 76 Fed. 767; *Rollins v. Board of Comrs.* 90 Fed. 575; *Prigg v. Lansburgh*, 5 D. C. App. 30; *Goodrich v. Senate*, 92 Me. 248; *Nat'l Bank, &c. v. New Bedford*, 175 Mass. 257; *Haile v. Palmer* 5 Mo. 403; *Bissell v. Hamblin*, 6 Duer. (N. Y.) 512;

*Chicago, &c. R. Co. v. Zapp*, 209 Ill. 339, 70 N. E. 623 (letterpress copies of original records of weather bureau held admissible, where the originals had been sent to Washington); *Taylor's Ev.* § 1429; *Greenleaf Ev.* §§ 483-496. But see *Kemp v. Metropolitan St. R. Co.* 88 N. Y. S. 1; *Griebel v. Brooklyn Heights R. Co.* 88 N. Y. S. 767.

<sup>15</sup> *Worcester v. Northborough*, 140 Mass. 397; *Imhoff v. Fleurer*, 2 Phila. 35.

<sup>16</sup> *Evanston v. Gunn*, 99 U. S. 660; *Sandy White v. United States*, 164 U. S. 104; *Lewis v. Marshall*, 5 Pet. (U. S.) 476; *Sumner v. Sebec*, 3 Me. 223; *Goodrich v. Senate*, 92

whose rights are affected, the facts recited ought not to be evidence. We well know that such applications are made frequently *ex parte*. And if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The legislature, in all its inquiring forms, by committees, makes no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be pre-judged, and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence, such a preamble as the present ought, in such a controversy, to be taken to answer the purpose for which it was intended, that is, an apology for the passage of the act, and the reason why the legislature so acted. Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true."<sup>17</sup>

In England such recitals were formerly held competent evidence to prove the facts stated. Referring to such evidence the Lord Chancellor said in one case: "It is very strong proof; for it is the well-known practice of this house not to allow the insertion of such a statement in the recitals of a private act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges to whom the bill has been referred."<sup>18</sup> But other cases in England deny the application of this rule.<sup>19</sup> In a later peerage case the Wharton Peerage Case was relied upon to establish the propositions that the recitals in a private statute were sufficient, but in answer to that Lord St. Leonards said: "That used to be the practice, but it is not so now. The evidence in support of private bills

Me. 248; *Commonwealth v. Chase*, 6 Cush. (Mass.) 248; 1 Greenleaf Ev. § 484.

<sup>17</sup> *Elmondorff v. Carmichael*, 13 Ky. (3 Litt.) 473; *Lord v. Bigelow*, 8 Vt. 445; *State v. Beard*, 1 Ind. 460; *McKinnon v. Bliss*, 21 N. Y. 206. For the effect of recitals in

municipal records, see *Hall v. People*, 21 Mich. 456, Vol. I, § 416.

<sup>18</sup> *Wharton Peerage*, 12 Cl. & Fin. 295, 302.

<sup>19</sup> *Duke of Beaufort v. Smith*, 4 Exch. 449; *Cowell v. Chambers*, 21 Beav. 619.



is not now submitted to and reported on by the judges, and future recitals will not, therefore, be evidence.”<sup>20</sup>

§ 1277. **Recitals in public documents—Effect as evidence.**—The question as to the effect of statements and recitals in public documents is somewhat different from the question of the legal effect of the contents of documents themselves. Many documents of both public and private nature contain explanatory statements or introductory recitals of existing or prior instruments which are intended to explain the execution of the document or to account for its existence. The effect of such statements and recitals as evidence has been frequently passed upon by the courts. The question generally raised is whether or not such recitals are conclusive, or whether they are merely *prima facie* evidence of the facts stated and consequently subject to rebuttal. These questions arise in three classes of cases: 1. Public statutes. 2. Private statutes. 3. Private writings. As a general rule, recitals in a public statute are regarded as competent evidence of the public matters stated therein,<sup>21</sup> and some of the decisions cited intimate that they are conclusive.

It is also the rule that public statutes and the facts which they recite must be noticed by courts without their being pleaded. One reason given by an English judge was that “public acts of Parliament are binding upon every subject, because every subject is, in

<sup>20</sup> *Shrewsbury Peerage*, 7 H. L. Cas. 1, 13.

<sup>21</sup> *Lane v. Harris*, 16 Ga. 217; *Dougherty v. Bethune*, 7 Ga. 90; *Brodnax v. Groom*, 64 N. Car. 244; *Rex v. Holt*, 5 T. R. 436; *Rex v. Lord George Gordon*, 2 Doug. 590; *Jones v. Randall*, Cowp. 17; *Rex v. De Berenger*, 3 M. & S. 67; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *Lord v. Bigelow*, 8 Vt. 445. But see Vol. 1, § 412. It seems to us that much must depend upon the nature of the recitals and the manner in which, or parties between whom, the question arises, and that recitals, even in a public statute, are not always conclusive. See *Kinkead v. United States*, 150 U. S. 483, 14 Sup. Ct. 172; *United States v.*

*Clafin*, 97 U. S. 546; *Reg. v. Haughton*, 1 El. & Bl. 316, 72 E. C. L. 516; *Mersey Docks v. Cameron*, 11 H. L. Cas. 519; *Priewe v. Wisconsin State Land Co.* 103 Wis. 537, 79 N. W. 780; *McKinnon v. Bliss*, 21 N. Y. 206, 213. It has been held by the supreme court of Georgia that the recital of a fact in a public statute did not operate to estop a party from denying it by plea and putting the fact in issue, but that courts must treat such facts as true until the contrary appear. *Beall v. Beall*, 8 Ga. 210; *Thornton v. Lane*, 11 Ga. 521; *Lane v. Harris*, 16 Ga. 217. See, also, *State v. Reed*, 4 Har. & J. (Md.) 7; *Campbell's Case*, 2 Bland (Md.) 233; *Dwyer v. Port Arthur*, 22 Can. Sup. Ct. 241.

judgment of law, privy to the making of them, and therefore supposed to know them."<sup>22</sup>

§ 1278. **Recitals in private writings.**—In regard to statements and recitals in private writings the rule is stated as follows: "The general rule in regard to recitals in deeds or other instruments is that they are evidence against the parties executing such deeds or instruments, and those who come under them, but not in their favor. The admissibility of the recital depends upon the same principles as the admissibility of a declaration of the party executing the instrument. Such recitals, therefore, are in general no evidence against third persons who are strangers to the deed or instrument in which they occur."<sup>23</sup>

An exception to this rule is found in cases of recitals in ancient documents, where such recitals have been held to be *prima facie* or presumptive evidence of the matters recited.<sup>24</sup> So recitals in a deed of trust are said to be *prima facie* evidence of the facts stated.<sup>25</sup> And recitals in a patent for land are evidence against a claimant who bases his claim on possession without title.<sup>26</sup> And it is the rule that recitals in ancient deeds are presumptive evidence of pedigree, where no adverse title by inheritance has been set up under the same ancestor.<sup>27</sup>

<sup>22</sup> *Rex v. Sutton*, 4 M. & S. 532; *Lane v. Harris*, 16 Ga. 217; *McKinnon v. Bliss*, 21 N. Y. 206; *Boyd v. Conklin*, 54 Mich. 583.

<sup>23</sup> *McKinnon v. Bliss*, 21 N. Y. 206.

<sup>24</sup> *Jackson v. Lunn*, 3 Johns. Cas. 109; *Doe v. Phelps*, 9 Johns. 169; *Jackson v. Lamb*, 7 Cow. 431.

<sup>25</sup> *Beal v. Blair*, 33 Iowa, 318; *Ingle v. Jones*, 43 Iowa, 286.

<sup>26</sup> *Whitmire v. Napier*, 4 S. & R. 290. See *Gingrich v. Foltz*, 19 Pa. St. 38.

<sup>27</sup> *Little v. Palister*, 4 Me. 209; 1 *Phillips Ev.* 137, 138.

## CHAPTER LXII.

### LEGISLATIVE AND EXECUTIVE DOCUMENTS.

Sec.		Sec.	
1279.	Public documents—Authentication.	1282.	State statutes.
1280.	Journals of congress and the legislatures.	1283.	Executive and legislative documents—Illustrations.
1281.	Same—Conflicting records.	1284.	State papers.

§ 1279. **Public documents—Authentication.**—The constitution provides that Congress may, by general laws, prescribe the manner in which the acts of the various legislatures shall be proved or authenticated in order to admit them in evidence in the courts of the various states. Pursuant to this provision Congress has declared that “the acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States shall be authenticated by having the seals of such state, territory or country affixed thereto.”<sup>1</sup>

It may be conceded that under this constitutional provision Congress would have the power to provide an exclusive method for the authentication of the statutes of the various states. But the statute does not seem to do this. In construing this act on this particular subject one court has said: “Prior to the passage of that act, and notwithstanding the existence of the constitutional provision, the only method of proving the written law of another state was that pointed out by the common law. By the act of 1790 Congress provided another method by which this could be done, viz., by the production of a copy of the act sought to be proved, duly authenticated by having the seal of the state affixed; but, surely, if it had been intended to

<sup>1</sup> U. S. R. S. § 905.

abolish the common-law rule and substitute another in its place rather than to provide an additional method for proving the statutes for the several states very different language would have been used—words which would have at least suggested the idea that such an intent existed.”<sup>2</sup>

In a case recently decided by the Supreme Court of the United States, it is also held that a Circuit Court of the United States sitting in a certain state may receive such evidence of the authentication of foreign statutes as the practice of the courts of such state may authorize and justify; and that copies of an act of Parliament were held to be sufficiently authenticated to be admissible in evidence in a Federal Court sitting in New Hampshire when produced by an attorney of thirty years’ practice in the English courts, in connection with his testimony that he was well acquainted with such act and that such copy was issued by authority and printed by Her Majesty’s printer and used as proof of the statutes in the English courts.<sup>3</sup>

**§ 1280. Journals of Congress and the Legislatures.**—The courts of this country follow the English rule, and have long held that the journals of Congress and of the state legislatures are admissible in evidence, as well as reports which have been sanctioned and published by authority, and volumes of documents containing reports of commissioners, and published under authority of Congress, have also been held admissible in evidence.<sup>4</sup> But these authorities do not make such records evidence if, intrinsically, they are not. In England, the journals of the House of Lords and of the House of Commons have always been admissible in evidence.<sup>5</sup>

The weight of authority is that, where the journals of the two

<sup>2</sup> Title Guar. &c. Co. v. Trenton, &c. Co. 56 N. J. Eq. 441 Atl. See, also, post notes 19 and 22.

<sup>3</sup> Nashua Savings Bank v. Anglo-American, &c. Co. 189 U. S. 221, 23 Sup. Ct. 517.

<sup>4</sup> Watkins v. Holman, 41 U. S. (16 Pet.) 25, 56; Post v. Supervisors, 105 U. S. 667; Spangler v. Jacoby, 14 Ill. 297; Wabash R. Co. v. Hughes, 38 Ill. 174; City of Covington v. Ludlow, 58 Ky. (1 Metc.) 295; Green v. Weller, 32 Miss. 650,

703; Root v. King, 7 Cow. (N. Y.) 613; State v. Moffitt, 5 Ohio, 358; Miller v. State, 3 Ohio St. 475; Miles v. Stevens, 3 Pa. St. 21; Coleman v. Dobbins, 8 Ind. 156.

<sup>5</sup> Rex v. Sutton, 4 Maule & S. 532; Jones v. Randall, 1 Cowp. 17; Rex v. Holt, 5 T. R. 436; Rex v. Gordon, 2 Doug. 590; Rex v. Franklin, 5 T. R. 445; Franklin’s Case, 9 How. St. Tr. 549; Chubb v. Salmons, 3 C. & K. 75; Starkie Ev. § 197.

houses of a legislature are kept pursuant to the Constitution, and duly certified by the proper officers, that they are public records, and are usually conclusive evidence of the proceedings of such bodies, and parol evidence is not admissible to contradict them; so that, if the Constitution has not been complied with in the passage of an act, the fact must be shown by the journals, or, perhaps, by the certificate of the secretary of state, who is the legal custodian of such documents, and not by parol evidence.<sup>6</sup> Not only are such records and documents proper evidence when properly offered in evidence, but it has been expressly held that the court may consult public documents containing official reports and correspondence of public officers of the states and United States, published by authority, and not formally introduced in evidence.<sup>7</sup>

**§ 1281. Same—Conflicting records.**—When a contest arises as to whether or not an act has passed, the journals of the legislature may be appealed to for the purpose of determining the question,<sup>8</sup> unless, in the particular jurisdiction, the case is one in which the enrolled bill is regarded as conclusive. The statute books, printed and published by authority, are not, ordinarily,

<sup>6</sup> *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203; *Happel v. Brethauer*, 70 Ill. 166; *State v. Moffitt*, 5 Ohio, 363; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Miller v. State*, 3 Ohio St. 475; *United States v. Ballin*, 144 U. S. 4, 12 Sup. Ct. 507; *Chicago, &c. R. Co. v. Smyth*, 103 Fed. 376. But see *Green v. Weller*, 32 Miss. 650; *Coleman v. Dobbins*, 8 Ind. 156; *Brodnax v. Groom*, 64 N. Car. 244. It may, however, appear by the enrolled bill itself that the statute is ineffective, and there are many jurisdictions in which a properly authenticated and enrolled bill cannot be impeached, ordinarily at least, even by looking to the journals. This subject, however, is not strictly one depending so much on rules of evidence as on rules of substantive law, and is sufficiently considered elsewhere. See Vol. I, § 44.

<sup>7</sup> *Bryan v. Forsyth*, 19 How. (U.

S.) 338; *United States v. Teschmaker*, 22 How. (U. S.) 105; *Gregg v. Forsyth*, 24 How. (U. S.) 179; *Romero v. United States*, 1 Wall. (U. S.) 721; *United States v. Neleigh*, 1 Black, 298; *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513. See, also, Vol. I, §§ 44, 48, 53; *Field v. Clark*, 143 U. S. 678, 12 Sup. Ct. 495; *City of Evansville v. State*, 118 Ind. 434, 20 N. E. 736.

<sup>8</sup> *Spangler v. Jacoby*, 14 Ill. 297; *Turley v. County of Logan*, 17 Ill. 151; *People v. Starne*, 35 Ill. 121; *Illinois, &c. R. Co. v. Wren*, 43 Ill. 77; *State v. McBride*, 4 Mo. 303; *Green v. Graves*, 1 Doug. (Mich.) 351; *Purdy v. People*, 2 Hill (N. Y.) 31; *People v. DeWolf*, 62 Ill. 253; *Burritt v. Commissioners, &c.* 120 Ill. 322; *Hanks v. People*, 39 Ill. App. 223; *Grob v. Cushman*, 45 Ill. 119; *Miller v. Goodwin*, 70 Ill. 659; *Koehler v. Hill*, 60 Iowa, 543.

conclusive evidence of the fact of the passage of acts in a proper and constitutional manner, and hence the journals may in most jurisdictions be inspected for that purpose,<sup>9</sup> or the enrolled bill may be looked to.<sup>10</sup> The enrolled bill generally controls the printed act<sup>11</sup> if there is conflict, and where the journals may be considered they control even the enrolled bill.<sup>12</sup>

But where an act of the legislature appears to be signed by the speakers of both houses, approved by the governor, and published as a statute of the state, the presumption is that it was duly passed, and the burden is upon the party assailing it to show its validity.<sup>13</sup> And where the journals of a legislative body show that a bill or ordinance was only reported, it cannot be proved by oral testimony that the bill was, in fact, reported and passed.<sup>14</sup>

§ 1282. **State statutes.**—Under the act of congress statutes of the several states may be authenticated by having the seal of the state affixed to copies thereof; and when this is properly done by the proper person it is conclusive evidence of such statutes in the courts of all the states of the Union. No formality is required other than the presence of the seal; and in the absence of all proof to the contrary the presumption is that the seal was affixed by one having the custody of the original record, and that he was authorized and competent to act.<sup>15</sup> The seal properly affixed is said to be conclusive evidence of

<sup>9</sup> Spangler v. Jacoby, 14 Ill. 297; Turley v. County of Logan, 17 Ill. 151; Prescott v. Board of Trustees, &c. 19 Ill. 323; State v. Price, 4 Ohio Cir. Dec. 296.

<sup>10</sup> Com. v. Martin, 107 Pa. St. 192; Purdy v. People, 4 Hill (N. Y.) 384; State v. Clare, 5 Iowa, 509; Koehler v. Hill, 60 Iowa, 554.

<sup>11</sup> Potter v. State, 92 Ala. 37; Epstein v. Levenson, 79 Ga. 718; Simpson v. Union Stock Yards Co. 110 Fed. 799.

<sup>12</sup> Simpson v. Union Stock Yards Co. 110 Fed. 799; State v. Green, 36 Fla. 154, 18 So. 334; Ritchie v. Richards, 14 Utah, 345, 47 Pac. 678, and numerous authorities there cited.

<sup>13</sup> People v. Loewenthal, 93 Ill. 191. But some courts hold generally under statutory provisions on

the subject, that the statute printed by authority is conclusive and that the courts cannot go behind these published statutes. People v. Devlin, 33 N. Y. 269; Eld v. Gorham, 20 Conn. 16; Fletcher v. Peck, 6 Cranch (U. S.) 131. See, also, People v. Highway Com'rs, 54 N. Y. 276, 13 Am. R. 581. And see as to printed journals. Post v. Kendall County, 105 U. S. 667; City of Detroit v. Board of Assessors, 91 Mich. 86, 51 N. W. 787; Santa Clara County v. Southern Pac. R. Co. 18 Fed. 385; Chicot County v. Davies, 40 Ark. 200.

<sup>14</sup> City of Covington v. Ludlow, 58 Ky. (1 Metc.) 295.

<sup>15</sup> United States v. Amedy, 11 Wheat. 392; United States v. Johns, 4 Dall. (U. S.) 412; Pease v. Peck,

the existence of the state statute.<sup>16</sup> Or, as otherwise stated, the seal of a state is of itself evidence.<sup>17</sup> And the laws of sister states, when printed under the authority of such state, have often been held admissible in evidence in the courts of other states. This was so held even where the statute was not exemplified according to the act of congress.<sup>18</sup> The act of congress does not, it has been held, provide an exclusive method of proving laws of another state; they may be proved in a proper case, as any other fact, by a professional witness who can state them from his own knowledge and experience.<sup>19</sup> The same rule applies to the unwritten law of a sister state.<sup>20</sup> So, an authorized edition of the laws of another state has been held competent to prove both public and private statutes.<sup>21</sup>

The fact that state statutes may be proved by the attestation of the seal of the state does not exclude other modes of proof, and a statute may be proved otherwise than by a copy under the seal of the state.<sup>22</sup> Some courts have indicated that a copy of a state statute, authenticated by the state seal, has the same authenticity under the statutes of the United States as an exemplification under the great seal in England.<sup>23</sup> The act of congress does not require even the attestation of any officer.<sup>24</sup> And it is the general rule that the printed statute book is not conclusive, but a court may, in case of a contest, go be-

18 How. (U. S.) 595; *State v. Carr*, 5 N. H. 367; *Haynes v. Brown*, 36 N. H. 545; *Biddis v. James*, 6 Bin. (Pa.) 321; *Spangler v. Jacoby*, 14 Ill. 297.

<sup>19</sup> *Pease v. Peck*, 18 How. (U. S.) 595; *United States v. Johns*, 4 Dall. (U. S.) 412; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *State v. Carr*, 5 N. H. 367; *Lord v. Staples*, 23 N. H. 448.

<sup>20</sup> *Dunlap v. Waldo*, 6 N. H. 450.

<sup>21</sup> *Lord v. Staples*, 23 N. H. 448; *State v. Stade*, 1 Chip. (Vt.) 303; *Kennebeck Prop v. Call*, 1 Mass. 483; *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Poindexter v. Barker*, 2 Hayw. 173; *Biddis v. James*, 6 Binn. (Pa.) 321; *Thompson v. Musser*, 1 Dall. (U. S.) 462; *United States v. Johns*, 4 Dall. (U. S.) 415.

<sup>22</sup> *Title Guarantee, &c. Co. v. Trenton Pot. Co.* 56 N. J. Eq. 441, 38 Atl. 422; *Nelson v. Lord Bridport*, 8

*Beav.* 535; *Baron De Bode's Case*, 8 Q. B. 265; *Sussex v. Peerage Case*, 11 Cl. & F. 114. But see *Contra: Raynham v. Canton*, 3 Pick. (Mass.) 293.

<sup>23</sup> *Greason v. Davis*, 9 Iowa, 219.

<sup>24</sup> *Biddis v. James*, 6 Bin. (Pa.) 321; *Thompson v. Musser*, 1 Dall. (U. S.) 463; *Young v. Bank of Alexandria*, 4 Cranch (U. S.) 388.

<sup>25</sup> *State v. Carr*, 5 N. H. 367; 1 *Starkie Ev.* 163, n. 2.

<sup>26</sup> *State v. Carr*, 5 N. H. 367; *Dunlap v. Waldo*, 6 N. H. 450; *Griswold v. Pitcairn*, 2 Conn. 85; *Henry v. Adey*, 2 Stark. 7, 3 East, 221.

<sup>27</sup> *Heathorn v. Doe*, 1 Blackf. (Ind.) 157. But it has been held that the officers having the custody of the seal should certify to the correctness of the copy. *Wilson v. Walker*, 3 Stew. (Ala.) 211; *Dunlap v. Waldo*, 6 N. H. 450.

hind the statute and show its correctness from the journals or the enrolled laws.<sup>25</sup> And they are the proper evidence upon all matters before either house of a legislature.<sup>26</sup>

§ 1283. **Executive and legislative documents—Illustrations.**—Under the general rule governing the admissibility of public documents as evidence, numerous instances are found in the decided cases on the admissibility of various executive, congressional and legislative documents. The fundamental rule applies to these as well as to all public documents, that, where the originals are competent evidence, duly authenticated copies are also admissible. And another general rule applies that reports of public officers, printed and published under official supervision, are presumably compared and correct copies of the originals, and thus become *prima facie* copies, and are within the principle admitting printed public documents in evidence as copies of the originals.<sup>27</sup> Under these rules it has been held that the American State Papers, published by authority of congress, containing copies of legislative and executive documents, are admissible in evidence in the various courts of the country. They are said to be as valid evidence as the originals are from which they were copied, and they may be read on mere inspection.<sup>28</sup>

Thus, a state register, made by law the public paper in which the official acts of the governor, required to be made public, are published, has been held admissible in evidence to prove the existence of facts stated in the governor's proclamation.<sup>29</sup> Acts of Congress, and proc-

<sup>25</sup> Spangler v. Jacoby, 14 Ill. 297; Prescott v. Board of Trustees, &c. 19 Ill. 323; Happel v. Brethauer, 70 Ill. 166; Beecher v. James, 2 Scam. (Ill.) 462; State v. McBride, 4 Mo. 303; DeBow v. People, 1 Den. 9; Purdy v. People, 2 Hill, 31; Rex v. Jeffries, 1 Strange, 446; Green v. Graves, 1 Doug. 351; Simpson v. Union Stock Yards Co. 110 Fed. 799.

<sup>26</sup> Spangler v. Jacoby, 14 Ill. 297; Root v. King, 7 Cowen, 613; Jones v. Randall, — Cowp. 17; 1 Greenleaf Ev. § 490.

<sup>27</sup> King v. Holt, 5 T. R. 436; Dunlany v. Dunlap, 3 Tenn. 306; Radcliff v. United Ins. Co. 7 Johns.

38; Bryan v. Forsyth, 19 How. (U. S.) 338; Watkins v. Holman, 16 Pet. (U. S.) 58; Milford v. Greenbush, 77 Me. 330; Whiton v. Albany Ins. Co. 109 Mass. 30; Gregg v. Forsyth, 24 How. (U. S.) 179; Thelluson v. Cosling, 4 Esp. 266.

<sup>28</sup> Bryan v. Forsyth, 19 How. (U. S.) 334; Watkins v. Holman, 16 Pet. (U. S.) 56; Dutillet v. Blanchard, 14 La. Ann. 97; Nixon v. Porter, 34 Miss. 697; Attorney General v. Rice, 64 Mich. 385, 26 Am. Law Reg. 299.

<sup>29</sup> Lurton v. Gilliam, 1 Scam. (Ill.) 577. But a register of a state land office, which is not a copy from the records of a public officer, and is



clamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the action of the national government, and the volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the Senate, was as competent evidence as the original documents themselves.<sup>30</sup> And it was held competent to read in evidence the charter of the City of New York from a volume printed by authority of the common council.<sup>31</sup>

So, a deed between Lord Baltimore, the proprietary of Maryland, and Thomas and Richard Penn, the proprietaries of Pennsylvania, enrolled in the court of chancery of England, but not proved or recorded in Pennsylvania, was admitted in evidence, being considered in the light of a state paper, well known to the courts of justice, which had been admitted as evidence on former occasions.<sup>32</sup> Yet, while a printed report of the comptroller of state made to the legislature is admissible in evidence, it is only *prima facie* evidence of the facts of which it assumes to speak, and the presumption raised thereby may be rebutted.<sup>33</sup> Marine ordinances of foreign countries, promulgated by the order of the president by the authority of congress, are admissible in evidence in the courts of the United States without further authentication or proof.<sup>34</sup>

§ 1284. **State papers.**—As already stated, a class of public documents of a peculiar nature, and which have long been admitted in evidence, are known as State Papers. But, to make them admissible, they must have the stamp of authority. The volumes known as the American State Papers, published by different officers of the government under the revision of the secretary of the senate, under the authority of the senate, contain authentic papers which are admissible in evidence without further proof.<sup>35</sup> In another early case, in referring to these documents, the United States Supreme Court said: "These State Papers were published by order of congress, and selected

not a record of a public character, is not admissible in evidence. *Gordon v. Bucknell*, 38 Iowa, 438.

<sup>30</sup> *Whiton v. Albany, &c. Ins. Co.* 109 Mass. 24.

<sup>31</sup> *Howell v. Ruggles*, 5 N. Y. 444.

<sup>32</sup> *Ross v. Cutshall*, 1 Bin. (Pa.) 399.

<sup>33</sup> *Dulaney v. Dunlap*, 3 Tenn. 306.

<sup>34</sup> *Amelia, The*, 1 Cranch (U. S.) 1, 38; *Radcliff v. United Ins. Co.* 7 Johns. (N. Y.) 38.

<sup>35</sup> *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Gregg v. Forsyth*, 24 How. (U. S.) 179; *Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408; *Magruder v. Perpall*, 13 Fla. 602.

and edited by the secretary of the senate and the clerk of the house. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of congress, could be read on mere inspection as evidence that it was the report sent in by the secretary of the treasury. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy.”<sup>36</sup> And it was held that “a certificate by the secretary of state, under seal of office, that a person has been recognized by the department of state as a foreign minister, is full evidence that he has been authorized and received as such by the President of the United States.”<sup>37</sup> And the Massachusetts court has said that “acts of congress, and proclamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the national government. And the volume of public documents, printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the senate, was as competent evidence as the original documents themselves.”<sup>38</sup>

The contents of papers of any of the executive departments of the United States are usually proved by a copy duly authenticated by the signature of the secretary under the seal of the department.<sup>39</sup> A certificate of the governor of the Island of St. Thomas was regarded as sufficient to prove official acts.<sup>40</sup> So a state register, containing the official acts of the governor, are admissible in evidence to prove the contents of a proclamation of the governor.<sup>41</sup>

<sup>36</sup> *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Dutillet v. Blanchard*, 14 La. Ann. 97; *Clemens v. Meyer*, 44 La. Ann. 390.

<sup>37</sup> *United States v. Benner*, 1 Baldw. C. C. (U. S.) 234; *United States v. Liddle*, 2 Wash. 205; *United States v. Ortega*, 4 Wash. 431.

<sup>38</sup> *Wheton v. Albany, &c. Ins. Co.* 109 Mass. 24; *Worcester v. North-*

*borough*, 140 Mass. 397; *Radcliff v. United Ins. Co.* 7 Johns. (N. Y.) 38; *King v. Holt*, 5 T. R. 436.

<sup>39</sup> U. S. R. S. § 882; *Cushing v. Nantasket Beach R. Co.* 143 Mass. 77.

<sup>40</sup> *United States v. Mitchell*, 3 Wash. C. C. 95.

<sup>41</sup> *Lurton v. Gilliam*, 2 Ill. 577.

## CHAPTER LXIII.

### ADMISSIBILITY OF RECORDS—PARTICULAR INSTANCES.

Sec.	Sec.
1285. Alcalde's, assessor's and auditor's records.	1300. Maps and plats.
1286. Births, marriages, parish records.	1301. Marine books and records.
1287. Board of health records.	1302. Market reports.
1288. Census records.	1303. Military records.
1289. Clerk's records.	1304. Municipal records.
1290. Committee's reports.	1305. Officers.
1291. Coroner's records.	1306. Post office records.
1292. Corporation books.	1307. Price lists.
1293. Custom house records.	1308. Prison records.
1294. Elections.	1309. School records.
1295. Highway records.	1310. Sheriff's records.
1296. Hospital and similar records.	1311. Surveyor's records.
1297. Land office records.	1312. Tax receipts and records.
1298. Letters patent.	1313. Township officer's records.
1299. Log books.	1314. United States officers.
	1315. Weather reports.
	1316. Miscellaneous records.

§ 1285. **Alcalde's, assessor's and auditor's records.**—The book of accounts kept in the office of the Alcalde, and handed over by each Alcalde to his successor as belonging to the office, is admissible in evidence as the register of the acts of that officer.<sup>1</sup> The functions and duties of such an officer are somewhat similar to those of a justice of the peace in England and in some states in this country, and those of the mayors of some of the municipalities in Europe.<sup>2</sup>

<sup>1</sup> Kyburg v. Perkins, 6 Cal. 674; 47 Cal. 348. See Secrest v. Jones, Donner v. Palmer, 31 Cal. 500; 21 Tex. 121.

Downer v. Smith, 24 Cal. 114; Lick v. Diaz, 37 Cal. 442; Sill v. Reese, <sup>2</sup> Abb. Law Dict; United States v. Castellero, 2 Black (U. S.) 194.

When the acts of assessors are material and relevant they may be established by their records.<sup>3</sup> Such records have been held *prima facie* evidence of the due assessment of taxes.<sup>4</sup> And these lists, showing to whom property is assessed, are some evidence of ownership.<sup>5</sup>

An examined copy of the assessment rolls kept in the office of the collector of internal revenue is admissible to prove the license to sell, and such a copy has been held sufficient although it was made by one who was not connected with the office, but who testified that he made it after examination of the records.<sup>6</sup> The report of auditors appointed by the court to state an account between the parties to an action has also been held to be *prima facie* evidence of the matters stated.<sup>7</sup> So, generally, the report of one who is by authority of law required to make a report and return of his acts is in the nature of a public record of such acts and facts upon which he was specifically directed to report.<sup>8</sup>

**§ 1286. Births, marriages, parish records.**—Records of marriages and births, duly certified by the officer having the custody thereof, are *prima facie* evidence of the contents.<sup>9</sup> By the common law, parish records are regarded as public records, and admissible in evidence under the common law rule governing such documents. A foreign register is admissible if kept in accordance with the local law, its genuineness, the signa-

<sup>3</sup> *Milo v. Gardiner*, 41 Me. 549.

<sup>4</sup> *Pittsfield v. Barnstead*, 40 N. H. 477. See, also, *Dudley v. Chilton County*, 66 Ala. 593. But compare *Highsmith v. State*, 25 Tex. Sup. 137. § 1312.

<sup>5</sup> *Holcroft v. Halbert*, 16 Ind. 256; *Painter v. Hall*, 75 Ind. 208. See post, § 1312, Tax receipts and records. *Bishop v. Hall*, 78 Ind. 370; *Elwell v. Hinckley*, 138 Mass. 225; *Scranton Poor Dist. v. Directors*, &c. 106 Pa. St. 446; *Thompson v. Chase*, 2 Grant (Pa.) 367.

<sup>6</sup> *State v. Spaulding*, 60 Vt. 228, 14 Atl. 769; *State v. Intoxicating Liquors*, 44 Vt. 208; *Commonwealth v. Heffron*, 102 Mass. 148.

<sup>7</sup> *Allen v. Hawks*, 28 Mass. (11 Pick.) 359.

<sup>8</sup> *Hiner v. People*, 34 Ill. 297; *Erickson v. Smith*, 38 How. Pr. (N.

Y.) 454; *Board of Control v. Royes*, 48 La. Ann. 1061; *Seavey v. Seavey*, 37 N. H. 125; *Watson v. Insurance Co.* 2 Wash. (U. S. C. C.) 152.

<sup>9</sup> *Blair v. Sayre*, 29 W. Va. 604; *Doe v. Barnes*, 1 M. & Rob. 386; *Rex v. Hawes*, 1 Den. Cr. C. 270; *Milford v. Worcester*, 7 Mass. 48; *Commonwealth v. Littlejohn*, 15 Mass. 163; *Martin v. Gunby*, 2 H. & J. 248; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226; *Jackson v. King*, 5 Cow. 237; *Richmond v. Patterson*, 3 Ohio, 368; *Jacocks v. Gilliam*, 3 Murphy (Tenn.) 47; *Hawes v. State*, 88 Ala. 37; *Tucker v. People*, 117 Ill. 91; *Succession of Justus*, 48 La. Ann. 1096; *Commonwealth v. Hayden*, 163 Mass. 453; *Royal Soc. &c. v. McDonald* (N. J. L.), 35 Atl. 1061.

ture of the registrar, and his authority by the local law being duly proved. In other cases the person who made the entries should be called; but, if dead, proof that such entries were made in the discharge of his duties is sufficient.<sup>10</sup> A record of births and marriages in the possession of the town clerk, and received by him from a former clerk as such, is admissible in evidence in a proper case, and has been held to be *prima facie* proof of the age of a pauper.<sup>11</sup>

A copy of a marriage license and certificate of the person solemnizing the marriage, properly authenticated by the officer in whose office the original license and certificate were filed, is admissible in evidence to prove the marriage.<sup>12</sup> But it has been held that a transcript of the record of marriages of a foreign country is not *prima facie* evidence of such marriage, in the absence of proof of a law of that country requiring such a record or register to be kept.<sup>13</sup>

Records of births, marriages, baptisms and burials, when kept in accordance with a statute and duly authenticated, are admissible to prove matters required to be so kept.<sup>14</sup> But an entry in a register of the christening of a child is not evidence of the time of its birth;<sup>15</sup>

<sup>10</sup> *Weaver v. Leiman*, 52 Md. 708; *Choteau v. Chevalier*, 1 Mo. 243; *Kingston v. Lesley*, 10 S. & R. 383; *Am. Life, &c. Co. v. Rosenagle*, 77 Pa. St. 507; *State v. Doons*, 40 Conn. 145; *Steyner v. Droetwich*, 1 Salk. 281, 12 Mod. 86; *Birt v. Barlow*, 1 Doug. 191; *Taylor, Ex parte*, 1 Jac. & W. 483, 3 Man. & R. 430; *Whittuck v. Waters*, 4 C. & P. 375; *Doe v. Andrews*, 15 Q. B. 759; *Coode v. Coode*, 1 Cust. Ecc. 764; *Davis v. Lloyd*, 1 C. & K. 275; *Stockbridge v. Quicke*, 3 C. & K. 305; *Abbott v. Abbott*, 29 L. J. Pr. & M. 57; 4 Swab. & T. 254; *Huet v. Le Mesurier*, 1 Cox Ch. 275; *Leader v. Barry*, 1 Esp. 353; *D'Aglié v. Fryer*, 13 L. J. N. S. Ch. 398; *Athlone's Peer Claim*, 8 Cl. & F. 262; *Dufferin Peer*, 2 H. of L. Cas. 47; *Rex v. Martin*, 2 Campb. 100; *Sawyer v. Baldwin*, 11 Pick. (Mass.) 494.

<sup>11</sup> *Sumner v. Sebec*, 3 Me. 223; *Wedgewood's Case*, 8 Me. 75. For

a full and interesting discussion of the subject, see *Kennedy v. Doyle*, 10 Allen (Mass.) 162.

<sup>12</sup> *Jackson v. People*, 2 Scam. (Ill.) 231; *Shutesbury v. Hadley*, 133 Mass. 242; *Kennedy v. Doyle*, 10 Allen, 161; *Haile v. Palmer*, 5 Mo. 403; *State v. Wallace*, 9 N. H. 515.

<sup>13</sup> *Stanlein v. State*, 17 Ohio St. 453. See, also, *Morrissey v. Wiggins's Ferry Co.* 47 Mo. 521.

<sup>14</sup> *Glenn v. Glenn*, 47 Ala. 204; *Shutesbury v. Hadley*, 133 Mass. 242; *Jackson v. People*, 2 Scam. (Ill.) 232; *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 43 Vt. 20; *Lewis v. Marshall*, 5 Pet. (U. S.) 470; *Whien v. Law*, 3 Stark. 63; *May v. May*, 2 Str. 1073; *Draycott v. Talbot*, 3 Bro. P. C. 564; *Doe v. Barnes*, 1 M. & Rob. 389; *Birt v. Barlow*, 1 Doug. 172.

<sup>15</sup> *Whien v. Law*, 3 Stark. 63; *Rex v. Clapham*, 4 Car. & P. 29; *Burghart v. Augerstein*, 6 Car. & P. 690; *Rex v. North Petherton*, 5 Barn. &

and in America, where there is no established church, parish and church records are not always admitted as public records,<sup>16</sup> but they are more often admitted, at least after the death of the person who made the entries, as entries made in the discharge of duty or ordinary course of business.

§ 1287. **Board of health records.**—Records of boards of health, kept pursuant to statutory requirements, are presumptive evidence of the matters properly therein contained.<sup>17</sup> But such records are not evidence as to the cause of death.<sup>18</sup>

§ 1288. **Census records.**—The printed compendium of the census reports is admissible to prove population.<sup>19</sup> This was held to be so because the book was compiled pursuant to an act of congress and printed at the government printing office at Washington, and was admissible upon the same grounds as printed volumes of state papers.

§ 1289. **Clerk's records.**—A record kept by a deputy clerk in the regular course of business, in which entries of titles and copies of copyright works are deposited to obtain copyright, with the dates of applications and times when articles were deposited, is admissible in evidence to show such deposit.<sup>20</sup> Payments endorsed on a bond by a county clerk are official entries.<sup>21</sup> Entries in fee books, and records by a clerk, are evidence on issues raised in an action for salaries.<sup>22</sup> So, record books of both county and town clerks have been held admissible.<sup>23</sup>

C. 508; *Rex v. Lubbenham*, 5 B. & Ad. 968; *Rex v. Weaver*, L. R. 2 C. C. 85; *Cope v. Cope*, 1 M. & Rob. 271; *Glenester v. Harding*, 29 Ch. D. 985; *Lavin v. Mutual Aid Soc.* 74 Wis. 349, 43 N. W. 143; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175; *Whitcher v. McLaughlin*, 115 Mass. 167; *Morrissey v. Ferry Co.* 47 Mo. 521; *Stoevers v. Whitman*, 6 Bin. 416; *Carskad-den v. Poorman*, 10 Watts (Pa.) 82; *Clark v. Trinity Church*, 5 W. & S. 266; *Derby v. Salem*, 39 Vt. 722.

<sup>16</sup> See *Morrissey v. Wiggins' Ferry Co.* 47 Mo. 521; *Kennedy v. Doyle*, 10 Allen (Mass.) 161.

<sup>17</sup> *Markowitz v. Dry Dock, &c. Co.* 33 N. Y. S. 702.

<sup>18</sup> *Buffalo Loan, &c. Co. v. Knight Templars' Assn.* 56 Hun, 303; *Buffalo Loan, &c. Co. v. Knight Templars' Assn.* 126 N. Y. 450.

<sup>19</sup> *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652. But see *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779.

<sup>20</sup> *Daly v. Webster*, 56 Fed. 483.

<sup>21</sup> *Lawrence Co. v. Dunkle*, 35 Mo. 395.

<sup>22</sup> *Lycett v. Wolff*, 45 Mo. App. 489.

<sup>23</sup> *Rizer v. Callen*, 27 Kans. 339; *People v. Hancock County*, 21 Ill. App. 271; *Greenfield v. Camden*, 74 Me. 56; *Shutesbury v. Hadley*, 133 Mass. 242. See, also, *Daly v. Webster*, 1 U. S. App. 573.

§ 1290. **Committee's reports.**—The report of a committee appointed by a public department of a foreign state is not necessarily admissible in evidence.<sup>24</sup> Nor is the report of a committee appointed by a public department of a foreign government, and addressed to that department, and acted upon by such foreign government, admissible in evidence in the courts of England to prove the matters stated.<sup>25</sup> And a document purporting to be a printed copy of the report of the Congressional Sub-committee, which is not authenticated and has never become a part of the journal or record of the house of representatives, is not admissible in evidence.<sup>26</sup> But reports of committees authorized by law are admissible in a proper case under the rule laid down in a preceding section.<sup>27</sup>

§ 1291. **Coroner's record.**—The verdict of a coroner's jury, approved and entered of record by him in his official capacity, has been held admissible in evidence to prove the manner and cause of death.<sup>28</sup> This doctrine is approved in a recent case, but it is held that the testimony taken by the coroner is inadmissible, at least where the witnesses can be procured, for any purpose except contradiction.<sup>29</sup> So, there are cases in which the report and even the verdict of the coroner have been held inadmissible.<sup>30</sup>

§ 1292. **Corporation books.**—The register of shares of a corporation has been held admissible to prove ownership.<sup>31</sup> So, generally, the books of a public corporation are competent evidence, in a proper case, to prove its acts.<sup>32</sup> The minutes of a corporation or body written on

<sup>24</sup> *Sturla v. Freccia*, L. R. 5 App. Cas. 623.

<sup>25</sup> *Sturla v. Freccia*, L. R. 5 App. Cas. 623.

<sup>26</sup> *Marks v. Orth*, 121 Ind. 10, 22 N. E. 668.

<sup>27</sup> See ante § 1285, Auditor's Reports.

<sup>28</sup> *U. S. Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 6. See, also, *People v. Devine*, 44 Cal. 452; *Sergeson v. Sealy*, 2 Atk. 412; *Burridge v. Earl of Sussex*, 2 Ld. Raym. 1292; *Faulder v. Sills*, 3 Campb. 126; *Sills v. Brown*, 9 Car. & P. 601; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. 123.

<sup>29</sup> *Knights Templar, &c. Co. v. Crayton*, 209 Ill. 339, 70 N. E. 623.

<sup>30</sup> See *National Un. v. Thomas*, 10 App. Cas. (D. C.) 277; *Mutual L. Ins. Co. v. Schmidt*, 6 Ohio Dec. (Reprint) 901; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. 215. And compare *Cox v. Chicago, &c. R. Co.* 92 Ill. App. 15; *Chambers v. Modern Woodmen (S. Dak.)* 99 N. W. 1107; *Union Cent. &c. Co. v. Hillowell*, 14 Ind. App. 611, 43 N. E. 277.

<sup>31</sup> *Queen v. Nash*, 21 L. J. M. C. 147.

<sup>32</sup> *Owings v. Speed*, 5 Wheat. (U. S.) 420; *Butler v. Ins. Co.* 45 Iowa, 93; *Loving v. Warren Co.* 14 Bush.

pieces of paper by the proper officer have also been held competent evidence on failure to record them in a more substantial manner.<sup>33</sup>

§ 1293. **Custom house record.**—A copy of an entry in a custom house book has been received in evidence.<sup>34</sup> But a mere certificate made out by a custom house officer is not evidence.<sup>35</sup>

§ 1294. **Elections.**—The return of inspectors of elections has been held to be prima facie evidence of the number of votes cast, even though it shows on its face erasures and alterations,<sup>36</sup> and such returns, when regular in form and properly made, have often been held prima facie, and, generally, in collateral proceedings, conclusive evidence of the facts properly stated therein.<sup>37</sup>

§ 1295. **Highway records.**—The survey and plat of a public road, made and returned by highway commissioners in locating a highway, has been held admissible in evidence in a proper case.<sup>38</sup> Indeed, while in most jurisdictions a highway may be shown to have been established by implied dedication and user, there are instances in which an existing record or a duly authenticated copy is the best and only evidence admissible.<sup>39</sup>

316; *Fraser v. Charleston*, 8 S. Car. 318; *Marriage v. Lawrence*, 3 B. & Ald. 142; *Warriner v. Giles*, 2 Stra. 954; *Gibbon's Case*, 17 How. St. Tr. 810; *Moore's Case*, 17 How. St. Tr. 854.

<sup>33</sup> *Pruden v. Alden*, 23 Pick. (Mass) 184; *Waters v. Gilbert*, 56 Mass. 27.

<sup>34</sup> *Tomkins v. Attorney General*, 1 Dow, 404; *United States v. Howland*, 2 Cranch C. C. (U. S.) 508; *United States v. Johns*, 4 Dall. (Pa.) 412; *D'Israeli v. Jowett*, 1 Esp. 427; *Barber v. Holmes*, 3 Esp. 190; *Wallace v. Cook*, 5 Esp. 117; *Johnson v. Ward*, 6 Esp. 48; *Henry v. Lee*, 3 Campb. 499. See § 1314.

<sup>35</sup> *Huntley v. Donovan*, 15 A. & E. (69 E. C. L.) 96.

<sup>36</sup> *People v. Minck*, 21 N. Y. 539. See for other documents, connected with elections, held admissible. *Enfield v. Ellington*, 67 Conn. 459, 34.

*Atl.* 818; *State v. Williams*, 96 Mo. 13.

<sup>37</sup> See *State v. Sherwood*, 15 Minn. 221, 2 Am. R. 116; *Patton v. Coates*, 41 Ark. 130; *Hadley v. Albany*, 33 N. Y. 603, 88 Am. Dec. 412; *Moulton v. Reid*, 54 Ala. 320; *People v. Miller*, 16 Mich. 56; *Smallwood v. Newbern*, 90 N. Car. 36. But not where it is not made by the proper officer, or the like. *McKinney v. O'Connor*, 26 Tex. 5; *Hall v. Manchester*, 39 N. H. 295; *Spaulding v. Mead*, Cl. & H. El. Cas. 157.

<sup>38</sup> *Hines v. People*, 34 Ill. 297; *Haray v. Houston*, 2 N. H. 309. See, also, *People v. Board of Madison County*, 23 Ill. App. 386, 125 Ill. 334, 17 N. E. 147. But see *Hayward v. Bath*, 38 N. H. 179.

<sup>39</sup> See *United States v. King*, 1 Cranch C. C. (U. S.) 444; *Dudley v. Buller*, 10 N. H. 281; *Commonwealth v. Logan*, 5 Litt. (Ky.) 286;



§ 1296. **Hospital and similar records.**—The daily record in regard to a patient at a hospital, when kept pursuant to law, is admissible in evidence when the contents are material to the issues.<sup>40</sup> So, the records of a house of correction, kept by a clerk pursuant to statutory provision, is a public record, and admissible in evidence when its contents are material to the issue.<sup>41</sup>

§ 1297. **Land office records.**—Records and reports of the register of the land office, and exemplifications of grants, are proper evidence when material.<sup>42</sup> But it has been held that a book in the custody of a county clerk, called a register of swamp lands, is not a public record, as there is no statute requiring it to be kept.<sup>43</sup>

§ 1298. **Letters patent.**—"Patents are public records."<sup>44</sup> So, copies of letters patent with specifications, exemplified by the secretary of state under the seal of his department, are admissible in evidence.<sup>45</sup>

§ 1299. **Log books.**—To render a log book admissible it should be proved to be the book kept on the voyage.<sup>46</sup> It is not, ordinarily, proof per se of the facts stated therein except in certain cases provided for by statute.<sup>47</sup> But the log book is admissible when the officer who

*Gillett v. Taylor*, 48 Ill. App. 403; *Whetton v. Clayton*, 111 Ind. 360, 12 N. E. 513 (record of vacation of highway best evidence); *Elliott Roads & Streets* (2d ed.) § 881. But, as stated in the text, the existence of highways may often be shown by parol evidence. *Elliott Roads & Streets* (2d ed.) § 392.

<sup>40</sup> *Hampton v. State*, 111 Wis. 127. See, also, *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40; *Naanes v. State*, 143 Ind. 299, 42 N. E. 609. But see *Butler v. St. Louis, &c. Ins. Co.* 45 Iowa, 93; *Kemp v. Metropolitan St. R. Co.* 88 N. Y. S. 1; *Griebel v. Brooklyn Heights R. Co.* 88 N. Y. S. 767.

<sup>41</sup> *People v. Kemp*, 76 Mich. 410, 43 N. W. 439. See post § 1308, *Prison Records*.

<sup>42</sup> *Galt v. Galloway*, 4 Pet. (U. S.) 332; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Meehan v. Forsyth*, 24 How.

(U. S.) 175; *Patterson v. Winn*, 5 Pet. (U. S.) 233; *Floyd v. Ricks*, 14 Ark. 286; *Liddon v. Hodnett*, 22 Fla. 442; *Wilcox v. Kinzie*, 4 Ill. 218; *Lane v. Bommelman*, 17 Ill. 95; *Lee v. Getty*, 26 Ill. 76; *Bellows v. Todd*, 34 Iowa, 18; *Wilson v. Hoffman*, 54 Mich. 246; *Welborn v. Spears*, 32 Miss. 138; *Barton v. Furrain*, 27 Mo. 235; *Grant v. Levan*, 4 Pa. St. 393; *Strimpfer v. Roberts*, 18 Pa. St. 283.

<sup>43</sup> *Carrington v. Potter*, 37 Fed. 767. See, also, *Cruse v. McCauley*, 96 Fed. 369.

<sup>44</sup> *Boyden v. Burke*, 14 How. (U. S.) 575.

<sup>45</sup> *Peck v. Farrington*, 9 Wend. (N. Y.) 44.

<sup>46</sup> *United States v. Mitchell*, 2 Wash. C. C. 478.

<sup>47</sup> *United States v. Gilbert*, 2 Sumn. 19; *United States v. Sharp*, Pet. C. C. (U. S.) 418.

kept it is dead, or his attendance cannot be secured, and the entries are immediate.<sup>48</sup>

§ 1300. **Maps and plats.**—Maps made by a public officer in the discharge of his duties, or under order of court, are admissible in evidence as public documents.<sup>49</sup> So, a map of the counties and towns of a state published by legislative authority is admissible in evidence on the question of boundaries.<sup>50</sup> And where the record in a partition case, referred for identification of the property to a plat recorded, by order of court, in the county recorder's office, in a plat book kept for that purpose, it was held that such plat book was a public record, and it, or a duly certified copy of the plat, was admissible in evidence as a public record.<sup>51</sup>

§ 1301. **Marine books and records.**—Lloyd's list and books have been admitted in evidence as in the nature of public documents for some purposes, but not for all. Thus it has been held that the book is evidence of a capture but is not evidence of notice to a particular person.<sup>52</sup> Lloyd's list has been admitted in evidence as against the underwriters, but not as against the assured.<sup>53</sup> Lloyd's register of shipping was held not admissible in evidence to show that the vessel was copper-fastened.<sup>54</sup> But these records are generally admissible for the purpose of proving damages or the value of a voyage.<sup>55</sup> It has been held, however, that a report made by the master showing the burthen of his ship, and delivered to the custom-house officers, is not admissible.<sup>56</sup>

<sup>48</sup> *D'Israeli v. Jewett*, 1 Esp. 427; *Barber v. Holmes*, 3 Esp. 190; *Watson v. King*, 4 Campb. 275; *Rex v. Fitzgerald*, 1 Leach, 24; *Rex v. Rhodes*, 1 Leach, 29; *Henry Coxon, The*, 38 L. T. 319, 27 W. R. 263. But see *Heathcote's Divorce*, 1 Macg. S. Cas. H. of L. 277.

<sup>49</sup> *Gates v. Kieff*, 7 Cal. 124; *Polnill v. Brown*, 84 Ga. 338; *Wells v. Compton*, 3 Rob. (La.) 171; *Commonwealth v. King*, 150 Mass. 221; *Surget v. Doe*, 24 Miss. 118; *St. Louis Pub. Schools v. Erskine*, 31 Mo. 110; *Henry v. Dulle*, 74 Mo. 443; *Schools, The v. Risley*, 10 Wall. (U. S.) 91; *People v. Denison*, 17

*Wend. (N. Y.)* 312; *Smith v. Hughes*, 23 Tex. 248.

<sup>50</sup> *Worcester v. Northborough*, 140 Mass. 397; *Commonwealth v. King*, 150 Mass. 221; *Ott v. Soulard*, 9 Mo. 581.

<sup>51</sup> *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228.

<sup>52</sup> *Abel v. Potts*, 3 Esp. 242.

<sup>53</sup> *Bain v. Case*, 3 Car. & P. 496 (681).

<sup>54</sup> *Freeman v. Baker*, 5 Car. & P. 475 (663).

<sup>55</sup> *Richardson v. Mellish*, 2 Bing. 229.

<sup>56</sup> *Huntley v. Donovan*, 15 A. & E. (69 E. C. L.) 96.

§ 1302. **Market reports.**—Market reports published in newspapers, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are admissible in evidence to prove the market price of a commodity on any particular day.<sup>57</sup> So it has been held that the market value of articles of merchandise at a particular place in a foreign country may be proved by letters written by third persons abroad, in the ordinary course of business, to other persons offering to sell such merchandise.<sup>58</sup>

§ 1303. **Military records.**—The registers of the army are evidence only when authenticated by the secretary of war, and then only as to matter contained therein,<sup>59</sup> or when authorized by statute and kept accordingly.<sup>60</sup> The roll of a company has been held competent to prove the company had mustered and that a soldier was absent on a particular day.<sup>61</sup> A warrant to a non-commissioned military officer is competent evidence to prove its contents.<sup>62</sup>

Books of adjutant-generals, published under legislative authority, containing a list of the officers and soldiers in the late Civil War, are competent evidence on the question of military settlement acquired by the soldiers.<sup>63</sup> So, the records kept by towns of the soldiers who comprised the troops of such towns, furnished by the state to the United States, are admissible in evidence to prove the enlistment of such soldiers.<sup>64</sup> It has also been held that certificate in due form, from the

<sup>57</sup> *Sisson v. Cleveland, &c. R. Co.* 14 Mich. 489; *Lush v. Druse*, 4 Wend. (N. Y.) 317; *Cleveland, &c. R. Co. v. Perkins*, 17 Mich. 296; *Clicquot's Champagne*, 3 Wall. (U. S.) 114; *Comstock v. Smith*, 20 Mich. 338; *Peters v. Thickstun*, 51 Mich. 589; *People v. Dow*, 64 Mich. 717; *Alfonso v. United States*, 2 Story, 421; *Brackett v. Edgerton*, 14 Minn. 174; *Laurent v. Vaughn*, 30 Vt. 90; *Whitney v. Thacher*, 117 Mass. 523; *Draper v. Saxton*, 118 Mass. 428; *Noonan v. Illsley*, 22 Wis. 27; *United States v. Champagne*, 1 Ben. (U. S.) 241; *Smith v. North Carolina R. Co.* 68 N. Car. 107.

<sup>58</sup> *Fennerstein's Champagne*, 3 Wall. (U. S.) 145.

<sup>59</sup> *Wetmore v. United States*, 10

*Pet. (U. S.)* 647; *Chapman Tp. v. Hernold*, 58 Pa. St. 106.

<sup>60</sup> *Worcester v. Northborough*, 140 Mass. 397.

<sup>61</sup> *Emery v. Goodwin*, 17 Me. 76; *Robinson v. Folger*, 17 Me. 206; *Matthews v. Bowman*, 25 Me. 157; *Cobb v. Lucas*, 15 Pick. 1; *Commonwealth v. Pierce*, 15 Pick. (Mass.) 170.

<sup>62</sup> *State v. Leonard*, 6 N. H. 435; *Gale v. Currier*, 4 N. H. 169; *State v. Wilson*, 7 N. H. 543; *Shattuck v. Gilson*, 19 N. H. 296.

<sup>63</sup> *Worcester v. Northborough*, 140 Mass. 397; *Brockton v. Uxbridge*, 138 Mass. 292. See *Hanson v. South Scituate*, 115 Mass. 336.

<sup>64</sup> *Hanson v. South Scituate*, 115 Mass. 336.

proper military officer, of an honorable discharge from the military service of the United States, was conclusive evidence of the cause and manner of the soldier's leaving such service.<sup>65</sup>

**§ 1304. Municipal records.**—Municipal records properly attested and identified are admissible in evidence when material and relevant.<sup>66</sup> So, the record of the administration of the oath of office to the clerk is competent to prove that fact.<sup>67</sup> The record is sufficient evidence of a meeting without producing the original notice.<sup>68</sup> Such records, in proper cases, are evidence of the abatement of taxes to a particular person.<sup>69</sup>

A record of the by-laws of a town, kept as required by the charter, requires no other proof.<sup>70</sup> A recital in a municipal record of the number of signers to a petition has also been held sufficient evidence of the fact.<sup>71</sup> The preliminary proof required to admit a record of ordinances is that it be shown that the book comes from the proper officer, from the proper custodian, and is attested and identified.<sup>72</sup> A printed

<sup>65</sup> *Fitchburg v. Lunenburg*, 102 Mass. 358; *Hanson v. South Scituate*, 115 Mass. 336.

<sup>66</sup> *People v. Eureka Lake, &c. Co.* 48 Cal. 143; *City of Greeley v. Hamman*, 17 Colo. 30; *Cook v. City of Ansonia*, 66 Conn. 413; *Fitch v. Pinckard*, 5 Ill. 69; *Lowe v. Town of Asoma*, 21 Ill. App. 598; *Bucksport v. Spofforde*, 12 Me. 487; *Barker v. Togg*, 34 Me. 392; *City of Boston v. Weynoath*, 58 Mass. (4 Ctsh.) 538; *Fruin-Bambrick, &c. Co. v. Geist*, 37 Mo. App. 509; *Bishop v. Cone*, 3 N. H. 513; *Thorn-ton v. Campton*, 18 N. H. 20; *Bow v. Allentown*, 34 N. H. 351; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Weith v. City of Wilmington*, 68 N. Car. 24; *Cheatham v. Young*, 113 N. Car. 161; *City of Delphi v. Lowrey*, 74 Ind. 520; *People v. Murray*, 57 Mich. 396; *St. Louis Gas, &c. Co. v. City of St. Louis*, 84 Mo. 202; *State v. Dugan*, 110 Mo. 138; *Howell v. Ruggles*, 5 N. Y. 444; *Walu v. City of Philadelphia* 99 Pa. St. 330; *Hutchinson v. Pratt*, 11 Vt. 402;

*Grafton v. Reed*, 34 W. Va. 172; *O'Mally v. McGinn*, 53 Wis. 353; *Hepler v. State*, 58 Wis. 46; *Hempton v. State*, 111 Wis. 127; *Isabell v. New York, &c. R. Co.* 25 Conn. 556; *Barker v. Fogg*, 84 Me. 292; *Thayer v. Stearns*, 1 Pick. (Mass.) 109; *Commonwealth v. Matthews*, 122 Mass. 60; *People v. Zeyst*, 23 N. Y. 140.

<sup>67</sup> *Briggs v. Murdock*, 30 Mass. 305.

<sup>68</sup> *Commonwealth v. Shaw*, 48 Mass. (7 Met.) 52.

<sup>69</sup> *City of Boston v. Weymouth*, 58 Mass. (4 Cush.) 538.

<sup>70</sup> *Town of St. Charles v. O'Malley*, 18 Ill. 407.

<sup>71</sup> *State v. Dugan*, 110 Mo. 138.

<sup>72</sup> *Downer v. Smith*, 24 Cal. 114; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *Welles v. Battelle*, 11 Mass. 477; *Sanborn v. School Dist.* 12 Minn. 17; *Beau v. Smith*, 20 N. H. 461; *Foxcroft v. Crooker*, 40 Me. 308. See *Ottumwa v. Schaub*, 52 Iowa, 515; *Dist. of Cal. v. Johnson*, 1 Mackay, 51.

book, containing the ordinances of a city and published by authority of the city, is admissible in evidence in most jurisdictions to prove the ordinance.<sup>73</sup> It has also been held that a certified copy of an ordinance is admissible, and is *prima facie* evidence that every step has been taken with reference to it, to make it a valid ordinance.<sup>74</sup> Where an officer fails to record the proceedings it has been held that they may be proved by parol.<sup>75</sup> And it has been held that the record kept by a city engineer and the register of a gas inspector are competent evidence.<sup>76</sup> So, it has been held that the record of a town clerk of his own appointment and qualification is competent to prove such fact.<sup>77</sup>

§ 1305. **Officers.**—Where officers are parties to an action their official acts in the way of returns made by them may be competent evidence.<sup>78</sup> Certificates and receipts under seal, or sign manual of officers of the United States, are sufficient to give faith and credit to such instruments.<sup>79</sup> It has also been held that entries in the note of evidence, made in the performance of official duty by a public officer, are *prima facie* evidence.<sup>80</sup>

The report or statement of an officer, such as county treasurer, showing the amount of money in his hands, at a particular time, is competent evidence of that fact, in a proper case, although the amount of such money is indicated by figures in a column, with a perpendicular line separating the two right-hand figures, without any other index of denomination.<sup>81</sup>

§ 1306. **Post office records.**—A record kept by a postmaster under

<sup>73</sup> *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443; *Boyer v. Yates City*, 47 Ill. App. 115; *McGregor v. Village of Lovington*, 48 Ill. App. 208; *Atchison, &c. R. Co. v. Cupello*, 61 Ill. App. 432; *Napman v. People*, 19 Mich. 352; *Holly v. Bennett*, 46 Minn. 386; *People v. Murray*, 57 Mich. 396; *Starks v. State*, 38 Tex. Cr. App. 233, 42 S. W. 379; *Missouri, &c. R. Co. v. Owens (Tex.)* 75 S. W. 579; *Campbell v. St. Louis, &c. R. Co.* 175 Mo. 161, 75 S. W. 86. But see *Dist. of Columbia v. Johnson*, 1 Mack. D. C. 51.

<sup>74</sup> *Lindsay v. City of Chicago*, 115 Ill. 120; *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894.

<sup>75</sup> *Hutchinson v. Pratt*, 11 Vt. 402.

<sup>76</sup> *St. Louis Gas, &c. Co. v. City of St. Louis*, 86 Mo. 495. Estimates made by a city engineer and filed in his department are *prima facie* evidence of their correctness. *Clarke v. Williams*, 29 Neb. 691.

<sup>77</sup> *Briggs v. Murdock*, 13 Pick. (Mass.) 305.

<sup>78</sup> *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Erickson v. Smith*, 38 How. Pr. (N. Y.) 454.

<sup>79</sup> *Herriot v. Bronssard*, 4 Mart. N. S. (La.) 260.

<sup>80</sup> *Short's Succession*, 45 La. Ann. 1485.

<sup>81</sup> *State v. Ring*, 29 Minn. 78.

the authority of the Post Office Department, showing the arrival and departure of mails, is admissible, generally, to prove any relevant fact therein recited.<sup>82</sup> But the officer cannot read from memoranda taken from such record.<sup>83</sup> Other post office records have also been held admissible in evidence.<sup>84</sup>

§ 1307. **Price lists.**—Price lists, stating the prices at which a manufacturer will sell, or statements of dealers in answers to inquiries, are competent evidence, in a proper case, of the market prices of marketable commodities.<sup>85</sup>

§ 1308. **Prison records.**—Entries made by a jailor in a record book kept for the purpose of showing the dates of receiving and discharging prisoners are admissible in evidence, although no statute requires such record to be kept.<sup>86</sup> The rule here is similar to that which prevails in regard to records of hospitals and the like.<sup>87</sup>

§ 1309. **School records.**—A record kept by a county school commissioner is a public record, and proper evidence of his official acts.<sup>88</sup> As said in the first case cited, when properly kept in the course of his duties and preserved as a "public monument," it is at least de facto a public record of the county.

§ 1310. **Sheriff's records.**—Entries by sheriff, and records kept by him as a part of the duties of his office, are admissible in evidence<sup>89</sup> in a proper case. There is some conflict or confusion among the authorities as to the effect of a sheriff's return in certain instances, but that subject is foreign to the one now under consideration.

<sup>82</sup> *Miller v. Boykin*, 70 Ala. 469.

<sup>83</sup> *Garney v. Howe*, 75 Mass. (9 Gray) 404.

<sup>84</sup> *Merriam v. Mitchell*, 13 Me. 439; *Haddock v. Kelsey*, 3 Barb. (N. Y.) 100.

<sup>85</sup> *Lust v. Druse*, 4 Wend. (N. Y.) 313; *Harrison v. Glover*, 72 N. Y. 451; *Clicquot's Champagane*, 3 Wall. (U. S.) 143; *Republican Newspaper Co. v. Northwestern Asso. Press*, 51 Fed. 377; *Keith v. Haggart*, 2 N. Dak. 18.

<sup>86</sup> *Sandy White v. United States*, 164 U. S. 100, 17 Sup. Ct. 38; *United States v. Cross*, 20 D. C. 380; *Rex*

*v. Arcles*, 1 Leach Cr. Cas. 438; *Salte v. Thomas*, 3 B. & P. 188.

<sup>87</sup> See ante, § 1296.

<sup>88</sup> *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *Sanborn v. School Dist. No. 10*, 12 Minn. 17; *Wormley v. Dist. Tp. &c.* 45 Iowa, 666; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Monaghan v. School Dist.* 38 Wis. 101. See *State v. Van Winkle*, 25 N. J. L. 73.

<sup>89</sup> *Kelly v. Green*, 63 Pa. St. 299; *Secrist v. Twitty*, 1 Mc. Mul. (S. C.) 255; *Brewster v. Vail*, 20 N. J. L. 56; *Barclay v. Bates*, 2 Mo. App. 139; *Bailly v. Pency*, 14 La. 14; *Fleming v. Williams*, 53 Ga. 556.

§ 1311. **Surveyor's records.**—A report of an official surveyor as to the present existence and location of objects is *prima facie* evidence.<sup>90</sup> So, a certified copy of the field notes of the surveyor general is admissible in evidence if the official character of the record is properly and sufficiently shown and the certificate is otherwise sufficient.<sup>91</sup>

§ 1312. **Tax receipts and records.**—A tax receipt, on proof of the signature, and that the maker was treasurer at the time of its execution, is admissible in evidence.<sup>92</sup> The book of the assessors and county treasurer or tax receiver, showing payments made to him of taxes, is an official document, and the entries are of *prima facie* character and competent evidence.<sup>93</sup> So, the book kept by a tax assessor, containing a statement of the tax assessment, is an official public document and competent evidence.<sup>94</sup> The assessment list for taxation is admissible in evidence as tending to prove value or ownership.<sup>95</sup> But the assessment roll or list has been held not to be competent evidence to prove the value of real estate in an action for damages.<sup>96</sup>

<sup>90</sup> *Crockett v. Greenup*, 4 Bibb. (Ky.) 158; *Snively v. McPherson*, 5 H. & J. (Md.) 150; *Spears v. Burton*, 31 Miss. 547; *Lessee of Stephens v. Bear*, 3 Bin. (Pa.) 31; *Boyles v. Johnston*, 6 Bin. (Pa.) 125; *Miller v. Carothers*, 6 S. & P. (Pa.) 215; *McCormick v. McMurtrie*, 4 Watts (Pa.) 192; *Den v. Pond*, 1 N. J. L. 379 (434); *Bryan v. Wear*, 4 Mo. 106; *Ott v. Soulard*, 9 Mo. 581.

<sup>91</sup> *Simmons v. Spratt*, 20 Fla. 495.

<sup>92</sup> *Williams v. Fitzpatrick*, 20 Ala. 791; *Johnstone v. Scott*, 11 Mich. 232.

<sup>93</sup> *Dudley v. Chilton County*, 66 Ala. 593; *McCrory v. Manes*, 47 Ga. 90; *Pittsfield v. Barnstead*, 40 N. H. 477; *Cardwell v. Mebane*, 68 N. Car. 485; *Foger v. Campbell*, 5 Watts (Pa.) 287; *Lewisburg v. Augusta*, 2 W. & S. (Pa.) 65; *Cuttle v. Brockway*, 24 Pa. St. 145; *Scranton Poor Dist. v. Directors*, &c. 106 Pa. St. 446; *Webb County v. Gonzales*, 69 Tex. 455; *Fuller v. Fletcher*, 44 Fed. 34; *Gage v. Davis*, 122 Ill. 520, 14 N. E. 36; *McKeen v. Haskell*, 108 Ind. 97; *Rokendorff*

*v. Taylor*, 4 Pet. (U. S.) 349; *White v. Beal & Fletcher, &c. Co.* 65 Ark. 278, 45 S. W. 1060; *Anthony v. Mercantile, &c. Asso.* 162 Mass. 60, 37 N. E. 780; *Beekman v. Hamlin*, 23 Ore. 313, 31 Pac. 707; *Hanover Water Co. v. Iron Co.* 84 Pa. St. 285; *Hecht v. Eherke*, 95 Iowa, 757, 64 N. W. 650; *Smith v. Andrews*, 2 Ch. 678; *Doe v. Seaton*, 2 Ad. & El. 171; *Doe v. Arkwright*, 2 Ad. & El. 182; *Doe v. Cartwright*, Ry. & M. 62.

<sup>94</sup> *Dudley v. Chilton County*, 66 Ala. 593; *Gage v. Parker*, 103 Ill. 528; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249; *Ellsworth v. Low*, 62 Iowa, 178; *State v. Gorham*, 65 Me. 270; *Cravens v. Duncan*, 55 Ind. 347; *Tolleson v. Posey*, 32 Ga. 372; *Winter v. Baudel*, 30 Ark. 362; *Cuttle v. Brockway*, 24 Pa. St. 145. § 1285.

<sup>95</sup> *Lynch v. Lively*, 32 Ga. 575; *Tolleson v. Posey*, 32 Ga. 372; *McCrory v. Manes*, 47 Ga. 90; *Sutton v. Floyd*, 7 B. Mon. (Ky.) 3; *Ellwell v. Hinckley*, 138 Mass. 225; *Graves v. Wakefield*, 54 Vt. 313.

<sup>96</sup> *Dudley v. Minnesota, &c. R. Co.* 77 Iowa, 408, 42 N. W. 359.

§ 1313. **Township officer's records.**—Records of a township clerk in the appraisal of damages caused by trespassing animals have been held competent.<sup>97</sup> So, the records of the office of township trustee are public records and admissible in evidence under the general rule.<sup>98</sup>

§ 1314. **United States officers.**—A certified copy from the navy department, duly certified by the secretary, attested by the seal of the department, is admissible in evidence<sup>99</sup> in a proper case. So, a letter from a vice-admiral, while in charge of the navy department, making a removal and giving the reasons for it, has been held competent evidence.<sup>100</sup> And it has been said that an official letter from the head of a department is equivalent to a deposition by such officer in the court of claims.<sup>101</sup> So, generally, letters addressed and received by him in his official capacity become public documents, and may be proved as such.<sup>102</sup> The books of a collector of customs are often admissible.<sup>103</sup> And the account books of a paymaster have also been held to be so far public books as to authorize the United States to use them in evidence in a proper case.<sup>104</sup>

§ 1315. **Weather reports.**—The meteorological observations of the signal service, taken and recorded by public officers under the authority of law, and as a part of their official duty, are public documents kept for public purposes, and are within the rule which admits in evidence official registers or records kept by persons in public office, and are admissible in evidence.<sup>105</sup> And a record of the weather kept at an

<sup>97</sup> *Lyons v. Van Gorder*, 77 Iowa, 600, 42 N. W. 500.

<sup>98</sup> *Anderson School Tp. v. Thompson*, 92 Ind. 556.

<sup>99</sup> *Maurice v. Worden*, 54 Md. 233.

<sup>100</sup> *Carpenter v. Bailey*, 56 N. H. 283. But see *Greely v. Thompson*, 10 How. (U. S.) 225; *Mason v. United States*, 4 Ct. of Cl. 495.

<sup>101</sup> *Savage v. United States*, 1 Ct. of Cl. 170; *Furman v. United States*, 5 Ct. of Cl. 579.

<sup>102</sup> *Hammatt v. Anderson*, 27 Me. 308; *Tripler v. City of New York*, 125 N. Y. 617; *Bell v. Levers*, 3 Yeates (Pa.) 23; *Peterson v. Logan*, 3 Yeates (Pa.) 195; *Bingham v. Cabot*, 3 Dal. (U. S.) 19; *United States v. Beattie*, Gilp. 92.

<sup>103</sup> *United States v. Howland*, 2

*Cranch* (U. S.) 508; *United States v. Johns*, 4 Dall. (Pa.) 412; *Merchants' Nav. Co. v. Amsden*, 25 Ill. App. 307. See, also, *Moore v. Anderson*, 8 Ind. 18; *Sampson v. Noble*, 14 La. Ann. 346. But compare *Sharp v. United States Ins. Co.* 14 Johns. (N. Y.) 201; *Miller v. Hill*, 10 Humph. (Tenn.) 470. § 1293.

<sup>104</sup> *United States v. Kuhn*, 4 Cranch (U. S.) C. C. 401. See § 1316.

<sup>105</sup> *Evanston v. Gunn*, 99 U. S. 660; *Chicago, &c. R. Co. v. Trayes*, 17 Ill. App. 136; *Knott v. Raleigh, &c. R. Co.* 98 N. Car. 73; *Moore v. Gans, &c. Co.* 113 Mo. 98, 20 S. W. 975; *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174; *Huston v. Council Bluffs*, 101 Iowa, 33, 69 N. W. 1130.



insane asylum for a number of years, for the purpose of showing the temperature, is admissible in evidence to prove the condition of the weather on any particular day.<sup>106</sup> Courts of admiralty admit light-house journals as official books kept under competent authority.<sup>107</sup>

§ 1316. **Miscellaneous records.**—A record of a plea of guilty in a criminal case is admissible in evidence in a civil action; but the party may explain the circumstances under which such plea was made.<sup>108</sup> The Bishop's registry in questions of disputed right to tithes<sup>109</sup> has been held admissible. The Gazette, in England, is evidence of a proclamation issued under an order of council.<sup>110</sup> A record of location of mining claims, required to be kept in a county recorder's office, is admissible in a proper case.<sup>111</sup> Records kept by overseers of the poor, for the purpose of preserving facts relating to paupers, with memoranda in reference to a pauper, are competent evidence.<sup>112</sup> And a copy of the bond of a public officer, certified under seal of the Treasury Department by an acting secretary of the treasury, is admissible in a suit by the United States on such bond.<sup>113</sup>

Entries in the minute books of a lodge are not admissible to prove the age of a member.<sup>114</sup> And it has been held that police records are not admissible unless required by law to be kept.<sup>115</sup> So, it has been held that the books of the registrar of trade-marks are not evidence that the trade-marks are *publici juris*.<sup>116</sup> And, while copies of documents filed and recorded in a public office, as directed by statute, usually thereby become public records,<sup>117</sup> a paper does not necessarily

<sup>106</sup> *De Armond v. Neasmith*, 32 Mich. 231; *Catherina Maria, The*, L. R., 1 Adm. & Ecc. 53.

<sup>107</sup> *Maria, The*, L. J., Adm. 163.

<sup>108</sup> *Albrecht v. State*, 62 Miss. 516; *Webb v. State*, 4 Coldw. (Tenn.) 199; 2 Taylor Ev. § 1694; 1 Greenleaf Ev. §§ 216, 527a; 2 Wharton Ev. §§ 783, 838.

<sup>109</sup> *Pulley v. Hilton*, 12 Price, 625.

<sup>110</sup> *Attorney General v. Theakstone*, 8 Price, 89; *Olivia, The*, 1 Lush's Adm. 497; *Rex v. Holt*, 5 D. & E. 436.

<sup>111</sup> *McGarritty v. Byington*, 12 Cal. 426; *Attwood v. Tricot*, 17 Cal. 37; *English v. Johnson*, 17 Cal. 107; *Pralus v. Pacific, &c. Co.* 35 Cal. 30; *Conner v. McPhee*, 1 Mont. 73.

<sup>112</sup> *Corinna v. Hartland*, 70 Me. 355.

<sup>113</sup> *Laffan v. United States*, 122 Fed. 333, 58 C. C. A. 495. Under R. S. § 886 as amended by act of March 2, 1895, c. 177, § 10, 28 St. 809 (U. S. Comp. St. 1901, pages 670, 671. See § 1314.

<sup>114</sup> *Connecticut, &c. Ins. Co. v. Schwenk*, 94 U. S. 593.

<sup>115</sup> *Garvey v. Wayson*, 42 Md. 178. See, also, *Kerr v. Metropolitan St. R. Co.* 27 Misc. (N. Y.) 190.

<sup>116</sup> *Orr v. Ewing*, L. R. 13 Ch. Div. 434.

<sup>117</sup> *Stone Land, &c. Co. v. Boon*, 73 Tex. 548, 11 S. W. 544.

become a public record merely because it is deposited or filed in a public office when there is no authority therefor and it is improperly filed in such office.<sup>118</sup>

<sup>118</sup> Colnon v. Orr, 71 Cal. 43, 11 Me. 223; Whitehouse v. Bickford, 29 Pac. 814; Broxson v. McDougal, 63 N. H. 471; St. Louis Pub. Schools Tex. 193; Brown v. Hicks, 1 Ark. v. Erskine, 31 Mo. 110.  
232. But see Sumner v. Lebec, 3

## CHAPTER LXIV.

### ANCIENT DOCUMENTS—PRACTICE.

Sec.		Sec.	
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1318.	Grounds of admissibility.	1328.	Custody of instrument—As proof of genuineness.
1319.	Admissibility—Practice and burden.	1329.	Proper custody — Presumption of delivery.
1320.	Proof of age—Circumstances.	1330.	Proper custody—What is.
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1322.	Age—Presumptions following.	1332.	Ancient deeds executed under power—Presumption.
1323.	Ancient documents prove themselves.	1333.	Ancient plans, surveys, and maps—Admissibility.
1324.	Ancient documents prove themselves—Limitations.	1334.	Ancient records—Admissibility.
1325.	Possession—As a circumstance.	1335.	Corporation and proprietary records.
1326.	Possession—Duration and extent.		

§ 1317. Documents — Admissibility affected by age.—There are classes of written instruments and documents which are admitted in evidence without the same formal and preliminary proof required in cases of most instruments and documents. This class is included under the general denomination of ancient documents. This subject has been treated in a general way, and with special reference to the hearsay rule, in a former chapter. The purpose here is to discuss it more in detail, and with reference to the question of practice and the admissibility in evidence of this class of documents, avoiding, at the same time, as far as possible, a repetition of principles and of citations.<sup>1</sup>

<sup>1</sup> Vol. I, ch. 18, §§ 421-433.

**§ 1318. Grounds of admissibility.**—This class of written instruments is admissible in evidence on account of age; but the fundamental bases of the admissibility are necessity and convenience. The law proceeds upon the theory that where the instrument is of great age it is no longer possible to make the formal proof as to its execution and delivery, and that, therefore, it must be admitted in evidence as matters both of convenience and necessity. Still, such instruments cannot be so admitted without some formality; the law is not generous enough to admit them in the absence of all proof as to their genuineness, and hence the first rule is that the party producing such an instrument and urging its admissibility must generally do all in his power to show its genuineness.<sup>2</sup>

**§ 1319. Admissibility—Practice and burden.**—The party producing an ancient document and offering it in evidence must make some satisfactory proof to the court that the instrument or document is what it purports to be. He must at least make a *prima facie* case; the evidence for this purpose is preliminary and addressed to the court. The general rule is well stated as follows: "The true rule as to receiving documents, ancient or otherwise, in evidence, is conceived to be this: the party offering the paper must make out a *prima facie* case for its reception; he must show that the paper is apparently as he contends. If he wholly fail to do this, the court should reject the paper; but if there be a reasonable probability established that the paper is what it purports to be the question then becomes one for the jury, and the paper ought to go before them with proper instructions. The real question affecting the consideration of such documents with the tribunal before which they are offered is, whether they are genuine, and contain a true statement of what they purport to contain. If found to possess these requisites there is no reason why they may not be read in evidence."<sup>3</sup> A Texas court laid down the same rule in language as follows: "The preliminary proof before the judge, to

<sup>2</sup>Smith v. Rankin, 20 Ill. 14; Wynn v. Tyrwhitt, 4 Barn. & A. 376; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283; Jackson v. Luquere, 5 Cow. (N. Y.) 221.

<sup>3</sup>Lawrence v. Tennant, 64 N. H. 532; Gibson v. Poor, 21 N. H. 440; Clark v. Owens, 18 N. Y. 434; Lunn v. Scarborough (Tex.), 24 S. W. 846; Williamson v. Mosley, 110 Ga. 53;

Swicard v. Hooks, 85 Ga. 580; Long v. Georgia Land, &c. Co. 82 Ga. 628; Watrous v. McGrew, 16 Tex. 507; Mapes v. Leal, 27 Tex. 345; Stroud v. Springfield, 28 Tex. 649; Williams v. Conger, 49 Tex. 582; Johnson v. Timmons, 50 Tex. 521; Glasscock v. Hughes, 55 Tex. 461; Gainer v. Cotton, 49 Tex. 117; Cox v. Cock, 59 Tex. 521; Rees v. Wal-

make a *prima facie* case, is but an earnest of the issue; but what will be sufficient for the purpose could not properly be embraced in a definition that would suit the facts of every case. It would be always proper to admit the paper when the proof is sufficient, if none opposing is offered, to sustain a verdict in favor of the genuineness of the instrument. In some cases it might be proper to admit it on less than this."<sup>4</sup>

Under Mr. Greenleaf's summary four things are necessary to render the document admissible: (1.) the document must have been in existence for thirty years or more; (2.) it must have been found in a proper custody; that is, in a place consistent with its genuineness; (3.) it must not have a suspicious appearance; (4.) there must be, if it purports to convey title to land, some other attendant circumstances corroborating its genuineness—either possession of the land or some other item of corroboration. It is not contended that the proof of these facts establishes the genuineness of the instrument, but upon proof of these the document is entitled to be admitted in evidence. These make a sufficient *prima facie* case.<sup>5</sup>

**§ 1320. Proof of age—Circumstances.**—The law does not require that the age of an instrument shall be proved by positive evidence; but, like any other fact, this may be proved by circumstances. That a paper is old and faded, and apparently corresponds in age with its purported date of execution; that it is free from erasures, interlineations and alterations, and that it exhibits no apparent blemishes, and has nothing upon its face which would cast suspicion upon its genuineness, these are circumstances which tend to prove its age and render it admissible in evidence. So, where it *prima facie* appears that the instrument was found in the place where it might reasonably be supposed that a genuine document of like character would be found, this is a strong circumstance supporting its genuineness.<sup>6</sup> The circum-

ters, 3 M. & W. 527; *Doe v. Keeling*, 11 Q. B. 884.

<sup>4</sup> *Beaumont, &c. Co. v. Preston*, 73 Tex. 478, 11 S. W. 503; *Warren v. Frederichs*, 76 Tex. 652, 13 S. W. 643; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049.

<sup>5</sup> 1 Greenleaf Ev. § 575b. See *Scott v. Delaney*, 87 Ill. 146; *Wisdom v. Reeves*, 110 Ala. 418.

<sup>6</sup> *Williams v. Conger*, 49 Tex. 582;

*Gardner v. Granniss*, 57 Ga. 539; *Hill v. Nisbet*, 58 Ga. 586; *Pridgen v. Green*, 80 Ga. 737; *Hollis v. Dashiell*, 52 Tex. 187; *Parker v. Chancellor*, 11 S. W. 503; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Walton v. Coulson*, 1 McLean, 120; *Havens v. Sea Shore Land Co.* 47 N. J. Eq. 365; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; *Lyon v. Ad-*

stances proved should be sufficient to raise a presumption of genuineness.<sup>7</sup> So recitals in an ancient deed may be a sufficient circumstance of genuineness.<sup>8</sup>

Possession is another circumstance corroborative of the genuineness of an ancient deed.<sup>9</sup> To this point it has been said that "what circumstances of corroboration shall be necessary to authenticate a deed or other writing offered under this exception to the general rule, which requires proof of execution, must greatly depend in each case upon the purpose and character of the instrument. They must be auxiliary to its apparent antiquity, and sufficient to raise a reasonable presumption of its genuineness."<sup>10</sup> Another circumstance which may be considered is that the instrument or deed has been acted on and referred to in other transactions and transfers by the parties claiming under it.<sup>11</sup> Where a deed or instrument, purporting to be an ancient writing, is offered and admitted in evidence, all the facts and circumstances which throw, or tend to throw, any light on the age and genuineness of the instrument should be admitted for the jury to determine from these whether or not the instrument is, in fact, an ancient document.<sup>12</sup>

**§ 1321. Computation of age.**—In estimating the age of an instrument for the purpose of determining whether or not it falls within the rule governing ancient documents, the date from which or to which the computation is to be made becomes important. In the case

de, 63 Barb. (N. Y.) 89; Enders v. Sternbergh, 1 Keyes, 268; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 288; Hewlett v. Cock, 7 Wend. (N. Y.) 371; Bogardus v. Trinity Church, 4 Sandf. Ch. 633; Stockdale v. Young, 2 McCord (S. Car.) 531; Duncan v. Beard, 2 McCord (S. Car.) 400; Wagner v. Aiton, 1 Rice (S. Car.) 100; Edmonston v. Hughes, 57 S. Car. 81; Jackson v. Burton, 11 Johns. 64; Swygart v. Taylor, 31 S. Car. 54; Kennard v. Withrow (Tex.), 28 S. W. 226; Schumor v. Russell, 83 Tex. 83; Ammons v. Dwyer, 78 Tex. 639, 15 S. W. 1049; Belcher v. Fox, 60 Tex. 527.

<sup>7</sup> Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283; Walton v. Coulson,

1 McLean (U. S.) 120; Chelsea Water Works v. Cowper, 1 Esp. 275; Fry v. Wood, 1 Selw. 492; Nanby v. Curtiff, 1 Price, 232; Bertie v. Beaumont, 2 Price, 308; Bullen v. Michel, 2 Price, 399.

<sup>8</sup> Hughes v. Wilkinson, 37 Miss. 482. See McCleskey v. Leadbetter, 1 Ga. 551.

<sup>9</sup> 1 Greenleaf Ev. § 575b, and notes.

<sup>10</sup> Stroud v. Springfield, 28 Tex. 649.

<sup>11</sup> Hollis v. Dashiell, 52 Tex. 187.

<sup>12</sup> Stooksberry v. Swann, 34 S. W. 369; Adams v. Roberts, 2 How. (U. S.) 486; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283.

of deeds, and, perhaps, in all cases, the time is not simply computed to the date of the beginning of the action, but to the time when the instrument is offered in evidence.<sup>13</sup> In estimating the age of wills in England the computation is made from the date of the will.<sup>14</sup> But in this country the thirty year period has been held to begin to run at the death of the testator.<sup>15</sup> There is, it has been said, no fixed rule as to the age of the instrument, and the rule of ancient documents has been applied to instruments varying from twenty-five to thirty years. But, while the courts may not always draw the line sharply, it is generally stated in general terms that the document must be at least thirty years old.<sup>17</sup>

**§ 1322. Age—Presumptions following.**—When the antiquity of an instrument has been established certain presumptions of law then arise. On such proof the law presumes that the attesting witnesses are dead, or that they are beyond the jurisdiction of the court, or that, if living, they no longer remember the particulars of the transaction, and they need not, therefore, be called. And hence the document may be proved by other and inferior evidence.<sup>18</sup> And this presumption is so strong and conclusive it does not yield where it appears that the at-

<sup>13</sup> *Johnson v. Shaw*, 41 Tex. 428; *Johnson v. Timmins*, 50 Tex. 521; *Veramendi v. Hutchins*, 48 Tex. 531; *Bass v. Sevier*, 58 Tex. 567; *Gardner v. Granniss*, 57 Ga. 539; *Reuter v. Stuckart*, 181 Ill. 529.

<sup>14</sup> *Doe v. Oldham*, Wolley, 8 B. & C. 22, 3 C. & P. 402; *Man v. Ricketts*, 7 Beav. 93; *McKenire v. Frazer*, 9 Ves. 5; *Doe v. Deakin*, 3 C. & P. 402; *Doe v. Wolley*, 8 B. & C. 22; *Gough v. Gough*, 4 T. R. 707 n.; *Man v. Ricketts*, 7 Beav. 93.

<sup>15</sup> *Jackson v. Blaushan*, 3 Johns. (N. Y.) 292; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 599; *Staring v. Bowen*, 6 Barb. (N. Y.) 109; *Shaller v. Brand*, 6 Bin. (Pa.) 435.

The cases, however, seem to make a discrimination and the English rule is evidently correct so

far as making proof of the execution of the will is concerned; for the reason that if thirty years or more have elapsed since the will was executed and attested, the presumption prevails of the death, absence or forgetfulness of the attesting witnesses. But where the genuineness of the will is sought to be established by proof of possession, then the computation dates from the death of the testator, as this is the time when the will takes effect. *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292.

<sup>17</sup> *Everly v. Stoner*, 2 Yeates (Pa.) 122.

<sup>18</sup> *Nixon v. Porter*, 34 Miss. 697; *Carter v. Chaudron*, 21 Ala. 72; *White v. Hutchings*, 40 Ala. 253; *Knox v. Silloway*, 10 Me. 201; *Brown v. Wood*, 6 Rich. Eq. (S. Car.) 155; *Pitts v. Temple*, 2 Mass. 538; *Stockbridge v. Stockbridge*, 14

testing witnesses are living, and that they are even present in court at the time the document is offered.<sup>19</sup>

In ancient transactions experience has proved that many important and essential facts must necessarily be presumed; and hence, when such facts are found to be stated or recited as having actually taken place, the probability of the truth of such statement is thereby increased and the presumption is strengthened.<sup>20</sup> The rule at common law, as stated by courts and law writers, is, "that deeds more than thirty years of age, and free from alterations or other just ground of suspicion, are presumed to be genuine, and do not require express proof of their execution."<sup>21</sup> So a presumption of the existence of an instrument for the required length of time may be raised by showing possession of property under the instrument for thirty years or more, if its date does not rebut this presumption.<sup>22</sup> And proof of handwriting of endorsements upon the instrument will be sufficient prima facie evidence to show its existence at the date of such endorsements.<sup>23</sup> A presumption of genuineness may be raised by showing that the instrument came from the proper custody.<sup>24</sup>

**§ 1323. Ancient documents prove themselves.**—It is frequently de-

Mass. 256; *King v. Little*, 1 Cush. (Mass.) 436; *Bell v. McCawley*, 29 Ga. 355; *Doe v. Roe*, 31 Ga. 593; *Burgin v. Chenault*, 9 B. Mon. (Ky.) 285; *Northrop v. Wright*, 24 Wend. (N. Y.) 226; *Clark v. Owens*, 18 N. Y. 434; *Urket v. Coryell*, 5 Watts. & S. 60; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Little v. Downing*, 37 N. H. 355; *Vattier v. Hinde*, 7 Pet. (U. S.) 253; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Burling v. Patterson*, 9 Car. & P. 570; *Talbot v. Hodson*, 7 Taunt. 251; *Rex v. Farrington*, 2 T. R. 471; *McKenire v. Fraser*, 9 Ves. 5.

<sup>19</sup> *Gardner v. Grannis*, 57 Ga. 539; *Shaw v. Pershing*, 57 Mo. 416; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 603; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Doe v. Burdett*, 4 A. & E. 19; *Doe v. Deakin*, 3 Car. & P. 402; *Marsh v. Collnett*, 2 Esp. 666. See, also, *Lawry v. Williams*, 13 Me. 281; 1 Greenleaf Ev. §§ 570, 575b.

<sup>20</sup> *Little v. Palister*, 4 Me. 209; *Gray v. Gardner*, 3 Mass. 399; *Colman v. Anderson*, 10 Mass. 105.

<sup>21</sup> *Mapes v. Leal*, 27 Tex. 345; *Hill v. Nisbet*, 58 Ga. 586; *Harlan v. Howard*, 79 Ky. 373; 1 Greenleaf Ev. § 21, 144.

<sup>22</sup> *Fairly v. Fairly*, 38 Miss. 280; *Jackson v. Laraway*, 3 Johns. Cas. (N. Y.) 283; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

<sup>23</sup> *Fairly v. Fairly*, 38 Miss. 280; *Jackson v. Laraway*, 3 Johns. Cas. (N. Y.) 283; *Carhampton v. Carhampton*, 1 Ir. T. R. 567; *Smith v. Rankin*, 20 Ill. 14; *Whitman v. Heneberry*, 73 Ill. 109; *Quinn v. Eagleston*, 108 Ill. 248; *Stebbins v. Duncan*, 108 U. S. 32; *Applegate v. Lexington, &c. Co.* 117 U. S. 255; *Pridgen v. Green*, 80 Ga. 737; *Bell v. Hutchings*, 41 S. W. 200.

<sup>24</sup> *Whitman v. Heneberry*, 73 Ill. 109.



clared to be a rule of law that ancient instruments and documents prove themselves, and that, after a lapse of thirty years, a written instrument, unaccompanied by any circumstances of suspicion, may be admitted without proof of its execution.<sup>25</sup> But it is not sufficient alone that the instrument merely bears date thirty years before its production; it must be shown that it has been in existence for that period of time. It is sufficient, however, if the circumstances proved create the presumption of such existence.<sup>26</sup> It is said that "the doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no farther than this."<sup>27</sup> The same rule applies to wills, and a will more than thirty years old may be read in evidence without proof of its execution.<sup>28</sup> But, whatever may be the force of the earlier cases, the rule was sometimes laid down too strongly. Perhaps the best statement of

<sup>25</sup> *Adams v. Roberts*, 2 How. (U. S.) 486; *Lee v. Tapscott*, 2 Wash. 276; *Barr v. Gratz*, 4 Wheat. 213; *Beall v. Dearing*, 7 Ala. 124; *White v. Hutchings*, 40 Ala. 253; *Sharpe v. Orne*, 61 Ala. 263; *Bernstein v. Humes*, 75 Ala. 241; *Alexander v. Wheeler*, 78 Ala. 167; *Woods v. Montevallo, &c. Co.* 84 Ala. 560; *Mallory v. Aspinwall*, 2 Day (Conn.) 280; *Smith v. Rankin*, 20 Ill. 14; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *Little v. Palister*, 4 Me. 209; *Joce v. Harris*, 1 Harr. & McH. 196; *Hoddy v. Harriman*, 3 Harr. & McH. 581; *Carroll v. Norwood*, 1 Harr. & J. 174; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *King v. Little*, 1 Cush. (Mass.) 436; *Fairly v. Fairly*, 38 Miss. 280; *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292; *Doe v. Phelps*, 9 Johns. (N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *Shaller v. Brand*, 6 Bin. (Pa.) 435; *Thompson v. Bullock*, 1 Bay (S. Car.) 364; *Brown v. Wood*, 6 Rich. Eq. (S. Car.) 155; *Middleton v. Mass.* 2

*Nott & McC.* 55; *Perry v. Clift* (Tenn. Ch.), 54 S. W. 121; *Stroud v. Springfield*, 28 Tex. 649; *Parker v. Chancellor*, 73 Tex. 478, 11 S. W. 503; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049; *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 243; *Holt v. Maverick* (Tex.), 23 S. W. 751; *Chamberlain v. Shonwalter* (Tex.), 23 S. W. 1017; *Kennard v. Withrow* (Tex.), 23 S. W. 226; *Walker v. Peterson* (Tex.), 23 S. W. 269; *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Rex v. Ryton*, 5 T. R. 259; *Williams v. Bass*, 22 Vt. 352; 2 *Phillips Ev.* (Cow. & Hill) 475.

<sup>26</sup> *Barr v. Gratz*, 4 Wheat. 213; *Robinson v. Craig*, 1 Hill (S. Car.) 389; *Fairly v. Fairly*, 38 Miss. 280; *Smith v. Rankin*, 20 Ill. 14; 1 *Greenleaf Ev.* § 575b; 2 *Phillips Ev.* 478, notes.

<sup>27</sup> *King v. Watkins*, 98 Fed. 913.

<sup>28</sup> *Doe d. Oldham v. Wolley*, 8 B. & C. 22; *Man v. Ricketts*, 7 Beav. 93; *McKenire v. Fraser*, 9 Ves. 5; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292; *Shaller v. Brand*, 6 Bin. (Pa.) 435.

the modern rule is as follows: "Strictly speaking, we apprehend no instrument, however ancient, can be said to 'prove itself.' All that we understand from the rule on this subject is, that, when an instrument appearing on its face to be thirty years old is produced, its authenticity may, in certain cases, be presumed; not from anything belonging solely to the instrument itself, but mainly from circumstances out of it, the existence of which, like all other facts, must be shown on the trial."<sup>29</sup>

§ 1324. **Ancient documents prove themselves—Limitations.**—A very common statement, especially in the earlier cases, is that ancient instruments prove themselves. But there are certain limitations to this rule. Something more than the bare production of a writing or document purporting to be thirty years old is necessary to secure its introduction in evidence. The mere proof that a deed or document is more than thirty years old, or that it has existed for any length of time, however great, is not sufficient evidence of its authenticity in the absence of other facts or circumstances attesting its genuineness.<sup>30</sup> Some of the earlier cases, both in England and America, state the rule without any qualification.<sup>31</sup> This entire subject is well and fully covered by a New York case, where it is said: "And showing that the instrument is thirty years old has no greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence, whether the time be long or short, has no tendency whatever, in a legal point of view, to prove the due execution of the instrument. . . . It has sometimes been loosely said that, when there are no circumstances of suspicion, a deed thirty years old proves

<sup>29</sup> 2 Phillips Ev. (Cow. & Hill) 476.

<sup>30</sup> Willson v. Betts, 4 Den. (N. Y.) 201; Fogal v. Pirro, 10 Bosw. (N. Y.) 100; Clark v. Owens, 18 N. Y. 434; McClesky v. Leadbetter, 1 Ga. 551; Harris v. Hoskins, 22 S. W. 251 (Tex.); Doe d. Stevens v. Clements, 9 U. C. Q. B. 650.

<sup>31</sup> Forbes v. Wale, 1 W. Bl. 532; Jones v. Waller, 2 Eagle & Y. 141; Wynne v. Tyrwhitt, 4 B. & A. 376; Chelsea Water Works v. Cowper, 1 Esp. 275; Doe d. Spilsbury v. Burdett, 4 A. & E. 19, 2 T. R. 471; Doe v. Brabank, 4 T. R. 709; Mc-

Kenire v. Fraser, 9 Ves. 5; Cunniffe v. Sefton, 2 East. 183, 6 Dow, 202; Doe v. Passingham, 12 E. C. L. 209; Henthorn v. Doe, 1 Blackf. (Ind.) 157; Robinson v. Craig, 1 Hill (S. Car.) 389; Hewlett v. Cock, 7 Wend. (N. Y.) 371; 2 Phillips Ev. 475. On examination of the cases which assert the rule without qualification it will be found that many of them in fact have some qualifying circumstances, and that these were sufficient to admit the instrument in evidence. Thus it was said in a case where a deed had been on record for

itself. But there is no just foundation, either in principle or authority, for such a dictum. . . . A lapse of sixty years, if there has been no possession, nor anything else to confirm the deed, has no greater tendency to prove the instrument genuine than the lapse of thirty years, or of a single day. Indeed, when nothing has ever been done under the deed, the lapse of time tends to discredit it. Courts have not relaxed the rules of evidence in relation to ancient deeds, because time alone furnishes any presumption in their favor; but because the lapse of time renders it difficult, and sometimes impossible, to give the usual proof of execution."<sup>32</sup>

**§ 1325. Possession—As a circumstance.**—The earlier rule was that the presumption of authenticity of an ancient deed could only be raised or established by proof of accompanying possession, or enjoyment under it, and that the possession must be shown to have been held for the full period, for when the possession fails the presumption in its favor fails also.<sup>33</sup> In one case it was declared that accompanying possession alone is that which establishes the authenticity of an an-

more than thirty years, but was improperly recorded, not having been duly acknowledged "but if it had been recorded in the proper court of the proper county more than twenty years before the day of the trial, the presumption was that its execution had been legally proved or acknowledged, and that the proper certificate had been 'written upon or under the deed.'" *White v. Hutchings*, 40 Ala. 253; *England v. Hatch*, 80 Ala. 247; *Allison v. Little*, 85 Ala. 512; *Hughes v. Wilkinson*, 37 Miss. 482. And where other evidence was wanting, the court on appeal said that it would presume the deed came from its proper custody, and that it bore the marks of age. *Alexander v. Wheeler*, 78 Ala. 167.

<sup>32</sup> *Willson v. Betts*, 4 Den. (N. Y.) 201; *Hewlett v. Cox*, 7 Wend. (N. Y.) 371; *Jackson v. Lamb*, 7 Cow. (N. Y.) 431; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100;

*Whitehouse v. Bickford*, 29 N. H. 471; *Little v. Downing*, 37 N. H. 355; *Havens v. Sea Shore Land Co.* 47 N. J. Eq. 365.

<sup>33</sup> *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Lyon v. Adde*, 63 Barb. (N. Y.) 89; *Northrop v. Wright*, 7 Wend. (N. Y.) 476; *Stearing v. Bowen*, 6 Barb. (N. Y.) 109; *Plummer v. Baskerville*, 1 Ired. Eq. (N. Car.) 252; *Davis v. Higgins*, 91 N. Car. 382; *Carroll v. Norwood*, 1 H. & J. (Md.) 167; *Waldron v. Tuttle*, 4 N. H. 377; *Everly v. Stoner*, 2 Yeates (Pa.) 122; *McGennis v. Allison*, 10 S. & R. (Pa.) 109; *Healy v. Moul*, 5 S. & R. (Pa.) 185; *Arnold v. Gorr*, 1 Rawle (Pa.) 223; *Robinson v. Craig*, 1 Hill (S. Car.) 391; *Thompson v. Bullock*, 1 Bay (S. Car.) 364; *Duncan v. Beard*, 9 S. Car. (2 N. & McC.) 400; *Von Rosenberg v. Haynes*, 85 Tex. 357; *Townsend v. Downer's Estate*, 32 Vt. 183; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *State v. Morse*,

cient deed.<sup>34</sup> But the later and more reasonable rule is that proof of possession under an ancient deed is a sufficient circumstance to entitle the instrument to be read in evidence. The rule has been aptly stated as follows: "A deed or instrument thirty years old or upwards, purporting to be a conveyance of property, real or personal, is sufficiently corroborated to be read without further assurance of authenticity by showing that possession of the thing it assumes to convey has gone along and been held in accordance with its provisions."<sup>35</sup>

§ 1326. **Possession—Duration and extent.**—The cases which hold that possession is the sole requisite for dispensing with proof of the execution of an ancient document also lay down the rule that the possession must be for the full period of thirty years. In other words, it is stated that the possession which will excuse the production of

50 N. H. 9; *Shaller v. Brand*, 6 Bin. (Pa.) 435; *Dishayer v. Maitland*, 39 Va. (12 Leigh) 524; *Caruthers v. Eldridge*, 12 Gratt. (Va.) 670; *Beal v. Derring*, 7 Ala. 124; *Doe v. Es-lava*, 11 Ala. 1028; *Carter v. Doe*, 21 Ala. 72; *Alexander v. Wheeler*, 78 Ala. 167.

<sup>34</sup> *Homer v. Cilley*, 14 N. H. 85; *Clark v. Wood*, 34 N. H. 447; *Sims v. De Graffenreid*, 3 McCord (S. Car.) 253.

<sup>35</sup> 2 Phillips Ev. (Cow. & Hill) 476; *Walton v. Coulson*, 1 McLean, 120; *White v. Hutchings*, 40 Ala. 253; *Bernstein v. Humes*, 75 Ala. 241; *Roe v. Doe*, Dud. (Ga.) 168; *Bell v. McCrawley*, 29 Ga. 355; *King v. Sears*, 91 Ga. 577; *Bennett v. Runyon*, 34 Ky. (4 Dana), 422; *Cook v. Totton*, 36 Ky. (6 Dana) 108; *Thruston v. Masterson*, 39 Ky. (9 Dana) 228; *Winston v. Gwathmey*, 47 Ky. (8 B. Mon.) 19; *Burgin v. Chenault*, 48 Ky. (9 B. Mon.) 285; *Taylor v. Cox*, 41 Ky. (2 B. Mon.) 429; *Davidson v. Morrison*, 86 Ky. 397; *Crane v. Marshall*, 16 Me 27; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Carroll v. Norwood*, 1 H. & J. (Md.) 167; *Osborne v. Tun-is*, 25 N. J. L. 633, 663; *Havens v. Sea Shore Land Co.* 47 N. J. Eq.

365; *Waldron v. Tuttle*, 4 N. H. 371; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Jackson v. Brooks*, 8 Wend. (N. Y.) 426; *Jackson v. Laraway*, 3 Johns. Cas. (N. Y.) 283; *Northrup v. Wright*, 7 Hill, 478; *Wilson v. Betts*, 4 Den. (N. Y.) 201; *Clark v. Owens*, 18 N. Y. 434; *Woods v. Banks*, 14 N. H. 101; *Clark v. Wood*, 34 N. H. 447; *Davis v. Higgins*, 91 N. Car. 382; 1 Greenleaf Ev. § 144; *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Jackson v. Davis*, 5 Cow. (N. Y.) 123; *Giddings v. Hall*, 1 H. & J. (Md.) 14; *Owings v. Norwood*, 2 H. & J. (Md.) 96; *Hall v. Giddings*, 2 H. & J. (Md.) 389; *Joce v. Harris*, 1 Har. & McH. (Md.) 196; *Hoddy v. Harriman*, 3 Harr. & McH. 581; *Middleton v. Mass*, 2 Nott & McC. (S. Car.) 55; *Duncan v. Beard*, 2 Nott & McC. (S. Car.) 400; *Doe v. Phelps*, 9 Johns. (N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *McGinnis v. Al-lison*, 10 S. & R. (Pa.) 109; *Tolman v. Emerson*, 4 Pick. (Mass.) 162; *Williams v. Conger*, 125 U. S. 397; *Fulkerson v. Holmes*, 117 U. S. 389; *Stroud v. Springfield*, 28 Tex. 664; *Holmes v. Coryell*, 58 Tex. 688; *Pasture Co. v. Preston*, 65 Tex. 451; *Parker v. Chancellor*, 73 Tex. 478;

witnesses must be for the full term of thirty years.<sup>36</sup> In some instances possession for twenty years, in connection with other circumstances, has been held sufficient, even as against an affidavit charging that the document was forged.<sup>37</sup> And possession for even a shorter time, with other circumstances, may be sufficient.<sup>38</sup> And it is sufficient if such possession is taken as was intended by the parties to the instrument.<sup>39</sup> And where it was admitted by both parties that the lands in controversy were wild and unimproved, or where they appeared to be worthless, possession for a short time before the commencement of the action was held sufficient.<sup>40</sup>

Nor is it essential to prove possession of the entire tract. A possession of part of the premises under the original conveyance affords evidence of its authenticity of as high a character as though the possession extended to the entire tract; and this is sufficient, even as against one in possession of another part of the premises.<sup>41</sup> And payment of taxes for more than thirty years has been held sufficient to admit an ancient deed.<sup>42</sup>

**§ 1327. Possession—Not essential to genuineness.**—In establishing the authenticity of ancient writings and deeds experience has demonstrated that it is often difficult, and sometimes impossible, to make proof of possession or of any other acts done under the deed. Therefore, to prevent injustice, the rule requiring proof of possession for the

Warren v. Frederichs, 76 Tex. 652.

<sup>36</sup> Jackson v. Blanshan, 3 Johns. (N. Y.) 292; Jackson v. Luquere, 5 Cow. (N. Y.) 221; Jackson v. Thompson, 6 Cow. (N. Y.) 178; Staring v. Bowen, 6 Barb. (N. Y.) 109; Fetherly v. Waggoner, 11 Wend. (N. Y.) 599; Waldron v. Tuttle, 4 N. H. 377; Robinson v. Craig, 1 Hill (S. Car.) 391; Healy v. Moul, 5 S. & R. (Pa.) 181; McGennis v. Allison, 10 S. & R. (Pa.) 197; Walker v. Walker, 67 Pa. St. 185. But see Nixon v. Porter, 34 Miss. 697.

<sup>37</sup> Gainer v. Cotton, 49 Tex. 101. But this does not preclude a party from proving that such ancient document was forged. Chamberlain v. Torrance, 14 Grants Ch. (Can.) 181.

<sup>38</sup> King v. Sears, 91 Ga. 577; Hughes v. Wilkinson, 37 Miss. 482; Cahill v. Palmer, 45 N. Y. 478; Townsend v. Estate of Downer, 32 Vt. 183.

<sup>39</sup> Walker v. Walker, 67 Pa. St. 185.

<sup>40</sup> Thursby v. Myers, 57 Ga. 157; Pridgeon v. Green, 80 Ga. 737; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283; Havens v. Sea Shore, &c. Land Co. 47 N. J. Eq. 365; Williams v. Hillegas, 5 Pa. St. 492.

<sup>41</sup> Jackson v. Davis, 5 Cow. (N. Y.) 123.

<sup>42</sup> Williams v. Hillegas, 5 Pa. St. 492; Shaw v. Pershing, 57 Mo. 416; Fulkerson v. Holmes, 117 U. S. 389; Whitman v. Heneberry, 73 Ill. 113.

full term of thirty years, or proof of any possession whatever, has been greatly relaxed. Some courts, even from an early day, insisted and held that a writing might be established as an ancient deed without any proof of possession, and that such proof was not absolutely essential to the genuineness of such documents nor to their admissibility in evidence. As stated by one court, the rule is: "The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument where no evidence justifying suspicion of its genuineness is shown and it is found in the custody of those legally entitled to it."<sup>43</sup> In passing upon this question the Supreme Court of Massachusetts say: "There has been much diversity of opinion whether the rule applies in cases of deeds of real estate where there is no proof of possession, but in England the doctrine seems to be that the absence of such proof goes rather to the weight of the evidence than to its admissibility; and in the United States the great weight of authority is that the deed is admissible without such proof."<sup>44</sup>

**§ 1328. Custody of instrument—As proof of genuineness.**—There are many instruments arising in the course of judicial investigation which are entitled to all the weight of ancient documents, and which do not pertain to the grant or conveyance of real estate. As to such writings the rule of proof of possession thereunder could not apply, and necessity forced the substitution of other tests. Hence another circumstance going to their genuineness is the custody of such ancient writings or documents. And the rule is that, before deeds or other

<sup>43</sup> Harlan v. Howard, 79 Ky. 373; Applegate v. Lexington, &c. Co. 117 U. S. 255; Barr v. Gratz, 4 Wheat. (U. S.) 213; Doe v. Eslava, 11 Ala. 1028; Carter v. Doe, 21 Ala. 72; Pridgen v. Green, 80 Ga. 737; Smith v. Rankin, 20 Ill. 14; Hewlett v. Cock, 7 Wend. (N. Y.) 372; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283; Winn v. Patterson, 9 Pet. (U. S.) 663; Jackson v. Lamb, 7 Cow. (N. Y.) 431; Willson v. Betts, 4 Den. (N. Y.) 201; Sanger v. Merritt, 120 N. Y. 109; Bar v. Gratz, 4 Wheat. 213; Shaw v. Penshing, 57 Mo. 416;

Long v. McDow. 87 Mo. 197; Williams v. Hillegas, 5 Pa. St. 492; Walker v. Walker, 67 Pa. St. 185; Swygart v. Taylor, 31 S. Car. (1 Rich. L.) 54; Johnson v. Timmons, 50 Tex. 521; Caruthers v. Eldredge, 12 Gratt. (Va.) 670. See Stroud v. Springfield, 28 Tex. 649; Holmes v. Coryell, 58 Tex. 680; Doe d. Lloyd v. Passingham, 2 Car. & P. 440; Rancliffe v. Parkyns, 6 Dow. 149; McKenire v. Frazer, 9 Ves. 5.

<sup>44</sup> Cunningham v. Davis, 175 Mass. 213; Harlan v. Howard, 79 Ky. 373.

instruments more than thirty years old, can be admitted in evidence without proof of execution, it must appear that they come from such custody as to show a reasonable presumption of their genuineness. The rule is also stated that such instruments are admissible when found in the proper custody. As expressed by one court, "The value of these documents, it is said, depends mainly on their having been contemporaneous with the act of transfer, if not part of it; care is first taken to ascertain their genuineness; and this is shown prima facie by proof that the document comes from the proper custody, or by otherwise accounting for it." This rule as to custody applies in absence of proof of possession or other facts, and is regarded as a sufficient circumstance in the absence of proof of any or all others.<sup>45</sup> When an ancient instrument is produced from a place which, under

<sup>45</sup> *Winn v. Patterson*, 9 Pet. (U. S.) 663; *Applegate v. Lexington, &c.* Co. 117 U. S. 255; *Doe d. Farmer v. Eslava*, 11 Ala. 1028; *Carter v. Doe*, 21 Ala. 72; *White v. Farris*, 124 Ala. 461; *Whitman v. Heneberry*, 73 Ill. 109; *Thursby v. Myers*, 57 Ga. 155; *Weltman v. Thiot*, 64 Ga. 11; *Pridgen v. Green*, 80 Ga. 737; *Long v. Georgia, &c. Co.* 82 Ga. 628; *Swicard v. Hooks*, 85 Ga. 580; *King v. Sears*, 91 Ga. 577; *Williamson v. Mosley*, 110 Ga. 53; *Gibson v. Poor*, 21 N. H. 440; *Adams v. Stanyan*, 24 N. H. 405; *Lyon v. Adde*, 63 Barb. 89; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; *Lau v. Mumma*, 43 Pa. St. 267; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Whitman v. Shaw*, 166 Mass. 451; *Scharff v. Keener*, 64 Pa. St. 376; *Cable v. Cable*, 146 Pa. St. 451; *Rodgers v. Riddlesburg, &c. Co.* 31 Leg. Int. (Pa.) 325; *Thompson v. Brannon*, 14 S. Car. 542; *Stroud v. Springfield*, 28 Tex. 649; *Hollis v. Dashiell*, 52 Tex. 187; *Wilson v. Simpson*, 80 Tex. 279; *Chamberlain v. Showalter*, 5 Tex. Civ. App. 226, 23 S. W. 1017; *Stooksberry v. Swann*, 12 Tex. Civ. App. 66, 34 S. W. 369; *Templeton v. Luckett*, 75 Fed. 254; *Bell v. Brewster*, 44 Ohio St. 690; *Follendore v. Follen-*

*dore*, 110 Ga. 359; *Long v. McDow*, 87 Mo. 197; *Little v. Downing*, 37 N. H. 355. See *Willson v. Betts*, 4 Den. (N. Y.) 201; *Mackey v. Armstrong*, 84 Tex. 159; 2 *Phillips Ev.* 481; *Jouett v. Gunn*, 13 Tex. Civ. App. 84, 35 S. W. 194; *Kellogg v. McCabe*, 14 Tex. Civ. App. 598, 38 S. W. 542; *Greenleaf Ev.* §§ 570, 575b; *Starkie Ev.* 292, 521, 523, 524; 1 *Wharton Ev.* §§ 732, 733; *Bere v. Ward*, cited 2 *Phillips Ev.* 481, and *Starkie Ev.* 523; *Bertie v. Beaumont*, 2 Price, 303; *Bullen v. Michel*, 2 Price, 399; *Wynne v. Tyrwhitt*, 4 B. & Ald. 376; *Rex v. Rytton*, 5 T. R. 259; *Dean of Ely v. Stewart*, 2 Atk. 44; *Manby v. Curtis*, 1 Price, 225; *Rex v. Long Buckley*, 7 East 45; *Jewison v. Dyson*, 9 M. & W. 540; *Doe v. Pulman*, 3 Q. B. 622; *Croughton v. Blake*, 12 M. & W. 205; *State v. Hodgson*, 9 Q. B. 727; *Bishop of Meath v. Winchester*, 3 Bing. (N. Car.) 183; *Forbes v. Wale*, 1 W. Bl. 532; *Fry v. Wood*, 2 Sel. N. P. 564; *Doe d. Thomas v. Benyon*, 12 Ad. & E. 431; *Evans v. Rees*, 10 Ad. & E. 151; *Van Every v. Drake*, 9 U. C. C. P. 478; *Rogers v. Shortis*, 10 Grant's Ch. (Can.) 243; *Cook v. Christie*, 12 U. C. C. P. 517; *Rees*

the law, is neither the proper nor legal custody, its presence at such a place must be properly and sufficiently accounted for, and in the absence of such proof it is not admissible as an ancient document.<sup>46</sup>

§ 1329. **Proper custody—Presumption of delivery.**—In a general way delivery is the act which breathes life into a written instrument; and, from the extreme difficulty or absolute impossibility of proving the delivery of ancient writings and documents the law justly requires the proof of such facts and circumstances from which delivery may be reasonably inferred. Accordingly it is held that the production of an ancient document from its proper custody raises a presumption that it was delivered, and, consequently, that it is genuine, and therefore renders it admissible in evidence. As a result of this rule, if the instrument is found in the possession of the party claiming under it, or if it has been recorded and comes from the proper place of record, delivery and consequent genuineness are presumed.<sup>47</sup> And the proper record of a deed, in records kept for that purpose, is presumptive evidence of delivery.<sup>48</sup> So delivery may be presumed from the proper attestation of a deed.<sup>49</sup>

§ 1330. **Proper custody—What is.**—As ancient documents, coming from the proper custody, bear prima facie the stamp of genuineness, it then becomes important to know the legal significance of proper custody. The impossibility of tracing private documents of this character from the custody of one person to another through successive generations is apparent. As already stated, the custody must be such as to afford a reasonable presumption of the genuineness of the document. Sir James Stephen lays down this rule on the subject: "Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had

v. Walters, 3 M. & W. 527; Graves v. Fisher, 3 Cl. & F. 1; Atkins v. Hatton, 2 Anst. 386; Randolph v. Gordon, 5 Price, 312; Thompson v. Bennett, 22 U. C. C. P. 393; Orser v. Vernon, 14 U. C. C. P. 573; Reg. v. Mytton, 2 El. & E. 557; Doe d. Shrewsbury v. Keeling, 2 A. & E. (636 C. L.) 884; Doe d. Jacobs v. Phillips, 8 Q. B. 158; Regina v. Kenilworth, 7 Q. B. 642; Chamberlain v. Torrance, 14 Grant's Ch. 181.

<sup>46</sup> Chamberlain v. Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

<sup>47</sup> Holmes v. Coryell, 58 Tex. 680; Gibson v. Poor, 21 N. H. 440; Adams v. Stanyan, 24 N. H. 405; Whitehouse v. Bickford, 29 N. H. 471.

<sup>48</sup> McArthur v. Morrison, 107 Ga. 796, 34 S. E. 205.

<sup>49</sup> Huff v. Crawford (Tex.), 32 S. W. 592.



a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.”<sup>50</sup> But it must be observed that the term “proper custody” is a relative term, and does not mean the most proper. The rule is further declared as follows: “It is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and proper, though differing in degrees; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine.”<sup>51</sup> A proper custody is also defined as one which affords a reasonable presumption of the genuineness of the document. By this is meant the custody of those legally entitled to it.<sup>52</sup>

“The reason why it is required that an ancient document shall be produced from the proper depository is, that thereby credit is given to its genuineness. Were it not for its antiquity, and the presumption that consequently arises that evidence of its execution cannot be obtained, it would have to be proved. It is not that any one particular place of deposit can have more virtue in it than another, or make that true which is false; but the fact of its coming from the natural and proper place tends to remove presumptions of fraud, and strengthens the belief in its genuineness. It may be false and so shown, notwithstanding the presumptions in its favor. If found where it would not properly and naturally be, its absence from the proper place must be

<sup>50</sup> Stephen Dig. Ev. art. 88; *Templeton v. Luckett*, 75 Fed. 254; *Applegate v. Mining Co.* 117 U. S. 255.

<sup>51</sup> *Bishop of Meath v. Marquis of Winchester*, 2 Bing. (N. Cas.) 183; *Gibson v. Poor*, 21 N. H. 440; *Doe d. Farmer v. Eslava*, 11 Ala. 1028; *Doe d. Neale v. Samples*, 8 A. & E. 151.

<sup>52</sup> *Harlan v. Howard*, 79 Ky. 373, 2 Ky. L. R. 368; *Doe d. Farmer v. Eslava*, 11 Ala. 1028, 1039; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371; *Jackson v. Lamb*, 7 Cow. (N. Y.) 431; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Whitman v. Heneberry*, 73 Ill. 109.

satisfactorily accounted for.”<sup>53</sup> The rule is that the record of a deed which is not entitled to be recorded, or which is improperly recorded, is not admissible in evidence. But where such a deed has been on record for a period of thirty years or more it is admissible in evidence as an ancient deed, this being regarded as the proper custody.<sup>54</sup>

§ 1331. **Proper custody—Illustrations.**—Letters thirty years old or more are classed as ancient documents, and when produced from the family papers of the person to whom they were addressed are presumed to have been written by the parties signing them, and both parties being dead they are admissible without further proof.<sup>55</sup> Ancient writings or documents found among the papers of a deceased person to whom they properly belong are in such proper custody as to entitle them to be read in evidence.<sup>56</sup>

A deed thirty years old or over, found in its proper custody, with other deeds, together constituting a chain of title, though unrecorded, and free from suspicion, is admissible in evidence without further proof.<sup>57</sup> And where deeds have been recorded without acknowledgment, or otherwise improperly admitted to record, and thereafter found in the possession of an owner, or former owner of the lands in controversy, this is such sufficient accounting as to their custody as to render them admissible in evidence in the absence of fraud or suspicion.<sup>58</sup> A deed found in the possession of the grantee, his children, or the heirs of such grantee, comes from a proper custody.<sup>59</sup> So, a will

<sup>53</sup> *Gibson v. Poor*, 21 N. H. 440.

<sup>54</sup> *Whitman v. Heneberry*, 73 Ill. 109; *Stalford v. Goldring*, 197 Ill. 156; *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546.

<sup>55</sup> *Bell v. Brewster*, 44 Ohio St. 690; *Lewis v. Lewis*, 4 Watts & S. (Pa.) 378. See *Swicard v. Hooks*, 85 Ga. 580; *Rex v. Inhabitants of Bathwick*, 2 B. & Ad. 639; *Roe d. Brune v. Rawlings*, 7 East 279.

<sup>56</sup> *Williams v. Conger*, 49 Tex. 582; *Jackson v. Lamb*, 7 Cow. (N. Y.) 431; *Frost v. Frost*, 21 S. Car. 501; *Stroud v. Springfield*, 28 Tex. 649; *Chamberlain v. Showalter*, 23 S. W. 1017; *Bertie v. Beaumont*, 2 Price, 303; *Andrew v. Motley*, 12 C. B. N. S. (104 E. C. L.) 514.

<sup>57</sup> *Doe v. Roe*, 31 Ga. 593; *Webb v. Wilcher*, 33 Ga. 565; *Templeton v. Luckett*, 75 Fed. 254; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Slater v. Hodgson*, 9 A. & E. (58 E. C. L.) 727.

<sup>58</sup> *Quinn v. Eagleston*, 108 Ill. 208.

<sup>59</sup> *Pettingell v. Boynton*, 139 Mass. 244, 29 N. E. 655; *Hogans v. Car-ruth*, 19 Fla. 84; *Shaw v. Pershing*, 57 Mo. 416; *Barr v. Gratz*, 4 Wheat. (U. S.) 213, 221; *Coulson v. Walton*, 9 Pet. (U. S.) 70, 72; *Havens v. Sea Shore Land Co.* 47 N. J. Eq. 365; *Polson v. Ingram*, 22 S. Car. 541; *Gainer v. Cotton*, 49 Tex. 101; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049;

in the possession of a devisee, though not probated.<sup>60</sup> The documents of any parish within a union deposited in the poor-house of the union.<sup>61</sup> Papers found among the private family documents of the descendants of a former bishop.<sup>62</sup> Books of a collector of tithes, whether taken from the custody of the executor, or the successor of the incumbent, or the successor of the collector.<sup>63</sup> So, proprietary records which contain strong internal evidences of their genuineness have been received from the custody of the Maine Historical Society.<sup>64</sup> And a deed coming from the proper custody with a defective probate by one of the subscribing witnesses is admissible in evidence.<sup>65</sup> A deed or instrument recorded in records kept for that purpose is regarded as in proper custody.<sup>66</sup>

### § 1332. Ancient deeds executed under power—Presumption.

Where a deed shows on its face that it is executed by virtue of some power or authority given, the rule is that such power or authority must be shown before the deed can be admitted in evidence. The purpose of this is that it may be made to appear that the execution of the instrument conforms to the power or authority granted.<sup>67</sup> But there are exceptions to this rule, and it has been held that the power to execute a deed will in many cases be presumed. The rule is that where a deed is admissible in evidence as an ancient deed, and it recites the power by which it was executed, the production and proof of such power in such case is not required. As antiquity is a sufficient reason for dispensing with the necessity of any proof by witnesses, of hand-

*Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Frost v. Frost*, 21 S. Car. 501; *Parker v. Chancellor*, 73 Tex. 475; *White v. Farris*, 124 Ala. 461; *Hedger v. Ward*, 54 Ky. (15 B. Mon.) 106; *Ryder v. Fash*, 50 Mo. 476; *Swinerton v. Marquis of Stafford*, 3 Taunt. 91; *Cook v. Christie*, 12 U. C. C. P. 517; *Rees v. Walters*, 3 M. & W. 527; *Thompson v. Bennett*, 22 U. C. C. P. 393; *Orser v. Vernon*, 14 U. C. C. P. 573; *Randolph v. Gordon*, 5 Price, 312; *Doe d. Shrewsbury v. Kieling*, 2 A. & E. (63 E. C. L.) 884; *Plaxton v. Dare*, 5 Man. & R. 1; *Doe d. Jacobs v. Phillips*, 8 A. & E. (55 E. C. L.) 157.

<sup>60</sup> *Doe v. Pearce*, 2 M. & Rob. 240;

*Andrew v. Motley*, 12 C. B. (N. S.) 526.

<sup>61</sup> *Slater v. Hodgson*, 9 Q. B. 727.

<sup>62</sup> *Meath (Bishop of) v. Winchester*, 3 Bing. (N. Cas.) 183.

<sup>63</sup> *Greenfield v. Camden*, 74 Me. 56; *Jones v. Waller*, 3 Gwill. 346.

<sup>64</sup> *Goodwin v. Jack*, 62 Me. 416.

<sup>65</sup> *Gardner v. Granniss*, 57 Ga. 539; *Pridgen v. Green*, 80 Ga. 737.

<sup>66</sup> *McArthur v. Morrison*, 107 Ga. 796, 34 S. E. 205; *Kennard v. Withrow (Tex.)*, 28 S. W. 226; *Culmore v. Medlenka*, 44 S. W. 676 (Tex.); *Pendleton v. Shaw*, 44 S. W. 1002 (Tex.).

<sup>67</sup> *Tolman v. Emerson*, 4 Pick. (Mass.) 160.

writing, when the deed purports to be executed by the grantor personally, there is said to be no good reason why, on the same principle, proof of the power by which it purports to be executed may not be dispensed with. In one case on this subject it is said: "After a lapse of forty-four years, and when the possessions have gone along with the deed, and when no pretense of claim in opposition to that deed has been heard of, the execution of the power of attorney recited in the deed may reasonably be presumed. An ancient deed, with possession corresponding with it, proves itself; and a power of attorney contained in such deed, and necessary to give it validity, or full effect, will be equally embraced by the presumption."<sup>68</sup>

**§ 1333. Ancient plans, surveys and maps—Admissibility.**—The rule relating to the admissibility of ancient writings is by no means limited to deeds, but, as has been shown, it includes all instruments of this character which may become material in the trial of any cause. Its most frequent use is in the application of the rule to instruments other than deeds which support title, or which show the boundaries and descriptions of real estate in actions between adjoining proprietors; among these are found ancient maps and plans, about the admissibility of which controversies arise. The rule is now settled that these documents are admissible in evidence when they relate to actual transactions, although between strangers, upon the same principles as ancient deeds.<sup>69</sup>

**§ 1334. Ancient records—Admissibility.**—An ancient record, like

<sup>68</sup> Doe v. Phelps, 9 Johns. (N. Y.) 169; Doe v. Campbell, 10 Johns. (N. Y.) 475; Tolman v. Emerson, 4 Pick. (Mass.) 160; Robinson v. Craig, 1 Hill (S. Car.) 389; Buhols v. Boudonsquite, 6 Mart. (U. S.) 153; McConnell v. Bowdry, 4 Mon. (Ky.) 395; Forman v. Crutcher, 2 A. K. Marsh. (Ky.) 69; Watrous v. McGrew, 16 Tex. 506; Dailey v. Starr, 26 Tex. 562; Johnson v. Shaw, 41 Tex. 428; Harrison v. McMurray, 71 Tex. 122. See Williams v. Hardie (Tex. Civ. App. 1892), 21 S. W. 267; Davidson v. Beatty, 3 Harr. & McH. 594.

record must be produced or accounted for.

<sup>69</sup> Commonwealth v. Roxbury, 9 Gray (Mass.) 451; Chapman v. Edmands, 3 Allen (Mass.) 512; Drury v. Midland R. Co. 127 Mass. 571; Boston Water, &c. Co. v. Hanlon, 132 Mass. 483; Whitman v. Shaw, 166 Mass. 451; Goodwin v. Jack, 62 Me. 414; St. Louis Pub. Sch. v. Erskine, 31 Mo. 110; Schools v. Risley, 10 Wall. (U. S.) 91; Gibson v. Poor, 21 N. H. 440; Whitehouse v. Bickford, 29 N. H. 471; Adams v. Stanyan, 24 N. H. 405; Lawrence v. Tennant, 64 N. H. 532; Bogardus v. Trinity Church, 4 Sandf. Ch. 633; McCausland v. Fleming, 63 Pa. St. 36; Pennypot Landing v. City of Philadelphia,

Some of these cases hold that where it appears that the power is of record, the presumption will not be indulged, and in such cases the

an ancient deed, is admitted in evidence without proof. After the lapse of thirty years the law presumes that the official who made the record is dead, and that he cannot be summoned to explain the circumstances under which he made it, and it is further presumed that everything was done which ought to have been done. This rule was applied to the record of an instrument which appeared to be formerly a deed and had been admitted to record on the attestation of one witness when the law required two witnesses, as after the lapse of thirty years the law presumes that there were two witnesses, and that the clerk or the person recording the instrument failed to copy the name of one of the attesting witnesses.<sup>70</sup>

§ 1335. **Corporation and proprietary records.**—On the question of the admissibility of ancient records of corporations and proprietaries, the rule is thus laid down by the supreme court of Maine: "Courts have felt obliged from necessity to depart from the strict rules of evidence in the admission of ancient writings, documents, books and records to prove the existence of the facts they recite. The rule of evidence requiring the testimony of the lawful custodian of books of record offered in evidence, that they are of the description claimed, but they are admissible, has repeatedly been relaxed in the case of ancient books of record of proprietors of land. In such instances such books have been held to prove themselves. When ancient books purporting to be the records of such proprietary, contain obvious internal evidence of their own verity, and there is now evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the record, they are admissible in evidence without proof of the legal organization of the proprietary or of its subsequent meetings."<sup>71</sup>

16 Pa. St. 79; *Sample v. Robb*, 16 Pa. St. 305; *Shinn v. Hicks*, 68 Tex. 277; *Burchfield v. McCauley*, 3 Watts. (Pa.) 9. See *Doe v. Rôe*, 31 Ga. 593; *Talbot v. Lewis*, 6 Car. & P. 603; *Van Every v. Drake*, 9 U. C. C. P. 478.

<sup>70</sup> *Dodge v. Briggs*, 27 Fed. 160.

<sup>71</sup> *Goodwin v. Jack*, 62 Me. 414; *Wiggin v. Mullen*, 96 Me. 375; *Proctor v. Maine, &c. R. Co.* 96 Me. 458; *Sumner v. Sebec*, 3 Me. 223; *Rust v. Boston, &c. Corp.* 6 Pick. (Mass.) 158; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *Monumvi*

*Beach v. Rogers*, 1 Mass. 159; *Pitts v. Temple*, 2 Mass. 538; *King v. Little*, 1 Cush. (Mass.) 440; *Codman v. Winslow*, 10 Mass. 146; *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451; *Little v. Downing*, 37 N. H. 355; *Colburn v. Ellenwood*, 4 N. H. 99; *Atkinson v. Bemis*, 11 N. H. 44; *Society, &c. Gospel v. Young*, 2 N. H. 310; *Cobleigh v. Yung*, 15 N. H. 493; *Peterborough v. Lancaster*, 14 N. H. 382; *Adams v. Stanyan*, 24 N. H. 405; *Malcomson v. O'Dea*, 10 H. L. Cas. 593.

## CHAPTER LXV.

### AUTHENTICATION AND EXEMPLIFICATION OF DOCUMENTS.

Sec.	Sec.
1336. Authentication—Meaning.	1348. Document of foreign country—Exemplification.
1337. Authentication and exemplification.	1349. Foreign deeds and mortgages—Exemplification.
1338. Attestation.	1350. Foreign officer—Certificate.
1339. Exemplification.	1351. Admissibility depends on authentication.
1340. Exemplified copy.	1352. Authentication — By proper person.
1341. Authenticity — How established.	1353. Certificate—Form and sufficiency.
1342. Certificate—Official capacity shown.	1354. Form of certificate—Separate copies.
1343. Conclusiveness depends on mode of authentication.	1355. Certifying to conclusions—Effect.
1344. Illegible words in original—Certificate.	1356. Deputy officer—Power to certify.
1345. Authentication not necessarily written.	1357. Presumption of regularity.
1346. United States Statute.	
1347. Exemplification of public records—Act of Congress.	

§ 1336. **Authentication — Meaning.**—The law does not permit either a partisan or a litigant to produce what he might call a correct copy of a public document and offer it in evidence without proper ceremony; it is not sufficient to say that it is a public record and hence cannot be taken from its public repository; nor does it satisfy the law to say that its custodian is beyond the jurisdiction of the court and he cannot therefore be compelled to produce the original. The law requires that the identity of the document, or its copy, be duly attested or certified in some manner known to the law. The process of so

identifying copies of such documents is termed authentication, and by this is meant that which is certified concerning it by the proper certifying officer or officers.<sup>1</sup> It is also said to be "the act of authenticating, verifying or establishing the authority, genuineness, validity, credibility or truth of anything; specially, in law, the official attestation of a written instrument."<sup>2</sup>

**§ 1337. Authentication and exemplification.**—As applied to the law of evidence authentication and exemplification mean "the act or mode of giving authority or legal authenticity to a statute, record or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence. An attestation made by a proper officer by which he certifies that a record is in due form of law, and that the person who certified it is the officer appointed to do so."<sup>3</sup> "A proper or legal attestation."<sup>4</sup> "A certificate by the proper officer of a thing done, or of the authority in one to do a thing."<sup>5</sup> "To give legal authority to an act, record, or other written instrument, so as to render it admissible in evidence, by certain prescribed formalities of attestation and certification, usually under seal." And a certificate is said to be "a writing signed by the judges of a court or single judge, or by an officer of the court certifying to or giving formal and official notice of certain facts; generally for the use of another court, judge or officer."<sup>6</sup> Only a record can be exemplified at common law under the Great Seal or seal of court.<sup>7</sup>

**§ 1338. Attestation.**—"The word 'attested,' where used with reference to judicial writings or copies thereof, as copies of records or judicial process, seems to have a legal meaning, which is an authentication by the clerk of the court so as to make them receivable in evidence." An attested copy is a copy officially verified to be such.<sup>8</sup>

<sup>1</sup> Ordway v. Couror, 4 Wis. 45.

<sup>2</sup> Century Dict. p. 386.

<sup>3</sup> Black Law Dict.

<sup>4</sup> Bouvier Law Dict.

<sup>5</sup> English Law Dict.

<sup>6</sup> Burrill Law Dict. But it is not requisite in all cases as to all kinds of records or documents that the certificate should be by the judge or an officer of court.

<sup>7</sup> 1 Greenleaf Ev. § 501 n. 1.

<sup>8</sup> Goss, &c. Co. v. People, 4 Brad.

(Ill.) 510; People v. Goss, &c. Mfg. Co. 99 Ill. 355; Wait v. Demeritt, 119 Mass. 158. The word "attest" is used in connection with witnessing the execution of instruments, and is distinguished from authentication and exemplification of records and documents. But Anderson Law Dict. defines "attest": "to certify to the verity of a copy of a public document." Wickersham v. Johnston, 104 Cal. 407.

§ 1339. **Exemplification.**—The term exemplification is defined as “an official transcript of a document from public records, made in form to be used as evidence, and authenticated as a true copy.” The term applies strictly to matters of record.<sup>9</sup>

When a certified copy or any other particular copy is by law designated as sufficient for the purpose of proving the contents of the original, it is regarded as primary evidence and excludes, so long as it can be produced, mere recollections of its contents.<sup>10</sup>

It has been held that where the word “copy” was not used in the statute, it was included in the word “attestation.”<sup>11</sup> Nor is it necessary for the certificate to state that it is a copy of any original.<sup>12</sup>

§ 1340. **Exemplified copy.**—An exemplification is defined as “a copy or transcript; especially an attested copy, as of a record under seal; an exemplified copy.” And an exemplified copy is defined as “a duplicate of the record of an act or a proceeding, authenticated under the court seal of the state, or under the seal of the court, with a certificate from the authorities appearing to have official custody of the record that they have caused to be exemplified.”<sup>13</sup> Where such a certified copy is made admissible by statute such copy must be made directly from the original and its correctness must be certified by the proper legal custodian of the record.<sup>14</sup>

Where certified copies are admissible in evidence no proof of the loss or destruction of the original is ordinarily required.<sup>15</sup> But notwithstanding the admissibility of certified copies some of the states require that the non-production of the original shall first be accounted for.<sup>16</sup>

<sup>9</sup> Black Law Dict., English Law Dict., Burrill Law Dict. See, also, Stephen Dig. Ev. art. 77, et seq., and appendix, note xxxi.

<sup>10</sup> Nason v. Jordan, 62 Me. 480; Stevenson v. Hoy, 43 Pa. St. 315; Nishayuna v. Albany, 2 Cow. (N. Y.) 537.

<sup>11</sup> Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89.

<sup>12</sup> Grinswold v. Pitcairn, 2 Conn. 85.

<sup>13</sup> Century Dict. 2063, 2064, 1 Greenleaf Ev. § 501.

<sup>14</sup> Goodrich v. Weston, 10 Mass. 362.

<sup>15</sup> Williams v. Hill, 16 Kans. 23; Pfefferle v. State, 39 Kans. 128; Bergman v. Bullitt, 43 Kans. 709; Woods v. Banks, 14 N. J. 101; Farrar v. Fessenden, 39 N. H. 268.

<sup>16</sup> Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287; Holtzclaw v. Edmondson, 114 Ga. 171, 39 S. E. 849; State v. Penny, 70 Iowa, 190, 30 N. W. 561; Pierce v. Georger, 103 Mo. 540; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; Manhattan &c. Co. v. Sweteland, 14 Mont. 269, 36 Pac. 84; American, &c. Co. v. Mouse River, &c. Co. 10 N. Dak. 290; 86 N. W. 965.



§ 1341. **Authenticity—How established.**—The authenticity of the record need not, in all cases and in all jurisdictions, be established by the legal custodian, but it may be sufficient, for a *prima facie* case, if it appears to come from the custody of the proper officer and is identified as a record of the particular office.<sup>17</sup> If the authenticity of the record or document be admitted then no other proof is required, and the record becomes evidence for whatever it may prove.<sup>18</sup>

§ 1342. **Certificate—Official capacity shown.**—An officer certifying a record or document should state the official character in which he acts, and the law will then presume he has the character which he assumes. While it may not be absolutely necessary that an officer should state his official capacity, and may be sufficient if in the body of the certificate facts are stated from which an incontrovertible presumption arises that the act was done in an official capacity,<sup>19</sup> the certificate in some form should contain intrinsic evidence of the official capacity of the person certifying; in other words, it should show that he is the person by whom the certificate is required by law to be made.<sup>20</sup> It has been held that the certificate itself is always *prima facie* evidence of the official character of the person making the same.<sup>21</sup>

§ 1343. **Conclusiveness depends on mode of authentication.**—The constitution and the act of Congress providing for the authentication of records, which also stipulate that records and proceedings of courts of one state shall have full faith and credit in courts of sister states, are conditioned upon the mode of authentication. While the courts hold that the act of Congress is not exclusive, yet it has also been held that in order to entitle the copy of the record to the full faith and credit contemplated by the constitution and the act of Congress, it must be certified or authenticated according to that act, and when

<sup>17</sup> Sandorn v. School Dist. No. 10, 12 Minn. 17.

But it is not a sufficient authentication where a witness testified that a former clerk in an office showed him a book and that he took minutes from it to aid in making surveys. Beau v. Smith, 20 N. H. 461.

Nor is it sufficient alone to show that a record had been deposited

in a certain office for six years. Franey v. Miller, 11 Pa. St. 434.

<sup>18</sup> Miller v. Hale, 26 Pa. St. 432.

<sup>19</sup> Donohoo v. Brannon, 1 Over (Tenn.) 327.

<sup>20</sup> Kirkland v. Smith, 2 Martin (La.) N. S. 497.

<sup>21</sup> Mott v. Smith, 16 Cal. 533, 552; Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172.

so done the record becomes conclusive; but when not so certified it is held to be only *prima facie* evidence of the matters therein stated.<sup>22</sup> And it has been held that the certificate of the officer or custodian is only *prima facie* evidence of the facts recited and may be rebutted.<sup>23</sup>

**§ 1344. Illegible words in original—Certificate.**—It is the duty of an officer or custodian of records to certify the record as it is. He cannot fill up the blank spaces by mere conjecture; nor can he properly leave blank spaces where the words of the original are wholly defaced by lapse of time or for other reasons have become defaced or obliterated, as this would give the impression that the original was thus defective or incomplete. The course to pursue where such obliterations occur is to note the fact in the margin of the copy and state it in the certificate by way of explanation, showing if possible the exact number of words, or the precise part of the document thus defective. The certified copy should be a fac-simile of the original as it is.<sup>24</sup>

**§ 1345. Authentication not necessarily written.**—From some holdings it would seem that the authentication need not necessarily be in writing, and a record may be authenticated otherwise than by the written certificate or attestation of an officer or a custodian. In passing on a statute on this subject one court said: "There does not appear to be any necessary or inherent meaning in the word 'authenticated,' as used in the section which requires the authentication to be in writing. The connection in which the word 'authenticated' is used in this or any other statute, may require the authentication to be in writing, and it may in one place mean only a written authentication, while in another place it may admit of an authentication not in writing. The words, 'properly and legally authenticated, so as to entitle them to be received as evidence,' etc., are properly to be construed as if the expression were 'so properly and legally authenticated as to entitle them,' etc.; that is, 'so properly and legally authenticated that they would be entitled to be,' etc. This authentication in regard to the original papers may be made by oral proof given here. . . . When copies are offered they must be authen-

<sup>22</sup> *Barker v. Field*, 2 Yeats (Pa.) 532; *Criswell v. Altemus*, 7 Watts (Pa.) 565; *Ordway v. Conroe*, 4 Wis. 45 (59). See *Edwards v. Jones*, 113 N. Car. 458.

<sup>23</sup> *Hastings v. Blue Hill, &c. Corp.* 9 Pick. (Mass.) 80.

<sup>24</sup> *Willey v. Portsmouth*, 35 N. H. 303; *Jones v. Hollopeter*, 10 S. & R. (Pa.) 326.

ticated according to the law of the foreign country. . . . But there is nothing in the statute which necessarily excludes oral proof authenticating the copies, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof that such oral authentication is according to the law of the foreign country.”<sup>25</sup>

**§ 1346. United States statute.**—The admissibility in evidence of authenticated copies of laws and records of one state in courts of other states has been regulated by an act of Congress, which, as subsequently amended, provides that “the acts of the legislature of any state or territory, or of any country subject to the United States, shall be authenticated by having the seal of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory or of any such country, shall be admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form, and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.”<sup>26</sup>

This statute is not exclusive and does not prevent the proof of records by the common law rule.<sup>27</sup> And any state may pass laws for the authentication of records of foreign states not inconsistent with the act of Congress.<sup>28</sup> But the general rule is that the certificate of a public officer is evidence only when made so by law.<sup>29</sup>

**§ 1347. Exemplification of public records—Act of Congress.**—By the act of Congress of March 27, 1804, all records and exemplifications of office books, which are or may be kept in any public office

<sup>25</sup> *In re Fowler*, 18 Blatchf. (U. S.) 430, 4 Fed. 303.

<sup>26</sup> U. S. R. S. 1878, ch. 17, § 905, 2 Desty Fed. Proc. § 425, and notes.

<sup>27</sup> *Goodwyn v. Goodwyn*, 25 Ga. 203; *Karr v. Jackson*, 28 Mo. 316.

<sup>28</sup> *Ordway v. Conroe*, 4 Wis. 45; *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S. E. 344; *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757; *Thrasher v. Ballard*, 33 W. Va. 285, 25 Am. St. 894. Or even, as to that state,

dispense with some of the requirements of the act of Congress. *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753.

<sup>29</sup> *Billingsley v. Hiles*, 6 S. Dak. 445, 61 N. W. 687; *Reynolds v. Dechaumes*, 22 Tex. 116; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056; *Sullivan v. State*, 66 Ill. 75; *Jay v. East Livermore*, 56 Me. 107; *Evans v. Labaddie*, 10 Mo. 425; *Parr v. Village Greenbush*, 72 N. Y. 463.

of any state not pertaining to a court, shall be proved or admitted in any other court or office in any other state by the attestation of the keeper of the said records or books and the seal of his office thereto annexed, if there be a seal, together with a certificate of the preceding justice of the court of the county or district as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of the court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor, or the keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made.<sup>30</sup> This statute requires the same proof of records not pertaining to a court that was required by a former act in regard to the records and judicial proceedings of courts. It also requires the certificate of one of the officers designated, to the effect that the attestation is by the proper officer, and when the certificate is made by the presiding justice of the court the clerk shall certify that the presiding justice was duly commissioned and qualified.<sup>31</sup>

**§ 1348. Documents of foreign country—Exemplification.**—On the ground of necessity and convenience copies of public records and documents of foreign countries duly authenticated are admissible in evidence; most, if not all of the states, have statutes to that effect. This subject is fully covered in the opinion in a New York case, where it is said: "I do not read our statute in reference to the exemplification of the records and judicial proceedings in any court in any foreign country as confining the admission of the records only of such foreign countries as shall have been acknowledged by this government as one of the independent powers of the world, and with which we have diplomatic intercourse. I think the obvious meaning of the statute is to admit the records of any court of any foreign country, and it is quite immaterial whether such foreign country is one of the great powers of the world, or one of minor importance and having

<sup>30</sup> U. S. R. S. § 906; 2 Desty Fed. Proc. § 426.

76. See, also, *Paca v. Dutton*, 4 Mo. 371.

<sup>31</sup> *Gavit v. Snowhill*, 26 N. J. L.

a circumscribed extent. The size of the country cannot alter the rule of evidence, and the records of a court of the republic of San Marino are of equal validity to those of the Empire of all the Russias. The only question is, does the record come from a court of a foreign country? If so, and it is properly authenticated, it is to be admitted as evidence under the provisions of our revised statutes. The court will take judicial notice that the Province of Upper Canada is a foreign country and forms no part of our own; that it has a government and courts, and that those courts proceed according to the course of the common law. The record produced was, therefore, the record of a court of a foreign country, and it is authenticated by the attestation of the clerk of the court with the seal of the court annexed. There is also attached the certificate of the chief justice of the court that the person attesting such record is the clerk of the court, and that the signature of such clerk is genuine. These papers are further authenticated by the certificate of the assistant secretary of state of said province, having charge of the great seal of said province, and which fact is attested by the affixing of the great seal to said certificate, and which of itself imports verity, under the authority of which government said court is held, and which certificate declares that such court is lawfully and duly constituted and specifies the general nature of its jurisdiction, and it also verifies the signature of the clerk of such court and the signature of the chief justice thereof. It seems to me, therefore, that all the provisions of the statute have been complied with to authorize the reading of this record in evidence in any court of this state."<sup>32</sup> But the records of a foreign power or country are to be certified as such only during its existence as such foreign country.<sup>33</sup>

§ 1349. **Foreign deeds and mortgages—Exemplification.**—The admissibility of exemplified copies of mere private writings such as deeds and mortgages, is controlled almost entirely by the local statutes of the several states. In connection with the recording acts of the several states, in many if not all there are also provisions for admitting in evidence duly certified copies of any such recorded instruments. This entire question is very elaborately discussed and fully covered in the opinion in a recent New Jersey case, which we

<sup>32</sup> *Lazier v. Westcott*, 26 N. Y. 146. *Pennywit v. Kellogg*, 1 Cin. Sup. (Ohio) 17.

<sup>33</sup> *Steere v. Tenney*, 50 N. H. 461;

take the liberty to quote at some length.<sup>34</sup> "The question here presented is whether a copy of a mortgage duly executed and acknowledged or proved in accordance with the laws of the state of New York, and duly recorded in accordance with the statute thereof, and which copy of the record, when certified, can be read without further proof in evidence in that state with like force as if the original was produced and proved, is a record which, when authenticated under the act of Congress, can be evidence in another state, in accordance with the provisions of the constitution requiring full 'faith and credit' to be given each state to the public records and judicial proceedings of every other state. . . . The statute of the state of New Jersey now provides for the recording of a mortgage in full, and that a transcript of such record, duly certified, shall be received in evidence in any court in this state in the same manner and to the same effect as a record or the transcript of a record of a deed is received.<sup>35</sup> A certified copy of a deed under our statute is received in evidence, and is as good, effectual and in law as if the original deed or conveyance were produced and proved.<sup>36</sup> A certified copy of an abstract of a mortgage shall be received as secondary evidence in any court of this state in the same manner as the record of deeds is now received, and shall be proof of the facts therein stated.<sup>37</sup>

The record of a power of attorney to convey lands received in the state of New York was not evidence to establish title to lands in New Jersey. But the reason was that the record could not have been evidence in the state of New York for this purpose, and, therefore, was not good in New Jersey for that purpose.<sup>38</sup> Entries in the book of a county treasurer of a county in Wisconsin was refused admission in this state upon an exemplification, but sworn copies were admitted. The entries in this case were not such as by the statute of Wisconsin were made prima facie evidence of the facts therein stated, and the exemplifications were refused admission on the ground that there was not proof of any provision of the law of Wisconsin showing what the effect of these entries was when offered in evidence in Wisconsin.<sup>39</sup>

The exemplification of a deed from another state was refused admission in the state of Virginia. The reason given was that the

<sup>34</sup> Chase v. Caryl, 57 N. J. L. 545,  
31 Atl. 1024.

<sup>35</sup> N. J. R. S. p. 706, § 18.

<sup>36</sup> N. J. R. S. p. 158, § 29.

<sup>37</sup> N. J. R. S. p. 489, § 1.

<sup>38</sup> State v. Engle, 21 N. J. L. 347.

<sup>39</sup> Condit v. Blackwell, 19 N. J.  
Eq. 193.

exemplification was not in due form.<sup>40</sup> A copy of the deed of trust from the records of the probate court of Alabama, where it had been recorded, was not admissible in evidence in a suit in Mississippi without accounting for the absence of the original, there being no statute in Alabama authorizing the use of copies. The registry acts of that state merely require the registration for the purpose of giving notice; nor had any statutes of the state of Mississippi enlarged the operation of the statute of Alabama in that state.<sup>41</sup> An exemplified copy of a deed or instrument of a marriage settlement from another state was refused admission in the courts of Georgia. It did not appear that there was any statute in either state making copies of the record evidence.<sup>42</sup> An exemplification of a registry of a mortgage in New Jersey was refused admission in the courts of New York because the statutes of New Jersey relative to the recording of mortgages contained no provision making the registry or copy thereof evidence. The mere registry was not sufficient. This was before the passage of the statute providing that a certified copy should be evidence.<sup>43</sup> A record of a marshal's deed in Alabama is not proof in the court of the state of Georgia so as to admit the deed in evidence without proof of execution.<sup>44</sup> This was an offer of the deed itself, it having been first recorded under the laws of Alabama, but the court held that the fact that it had been merely recorded in Alabama did not dispense with the proof of its execution, and to the same effect when a mortgage was offered.<sup>45</sup> Besides, it does not appear that the statute of Alabama made the copy evidence. . . . In Pennsylvania it was held that the record of a mortgage of land in New Jersey, though but an abstract of the mortgage, still the record being according to the law of New Jersey it is competent evidence when authenticated according to the act of Congress.<sup>46</sup> It was held in Kentucky that where by the laws of Virginia a deed was required to be recorded to give it validity, the production of an exemplified copy from the record was sufficient proof of the execution of a deed, the original in that case being produced but not proved.<sup>47</sup> In Delaware it was held that an office copy of a deed is

<sup>40</sup> *Dummond v. McGruder*, 9 Cranch (U. S.) 192.

<sup>41</sup> *Griffin v. Reynolds*, 17 How. (U. S.) 610.

<sup>42</sup> *Russell v. Kearney*, 27 Ga. 96.

<sup>43</sup> *Quay v. Eagle, &c. Co.* Anth. (N. Y.) 237.

<sup>44</sup> *Papot v. Southwestern R. Co.* 74 Ga. 296.

<sup>45</sup> *Basken v. Vernon*, 52 Ga. 96.

<sup>46</sup> *Garrigues v. Harris*, 17 Pa. St. 344.

<sup>47</sup> *King v. Mims*, 7 Dana (Ky.) 267.

such a record as must be authenticated under the act of Congress to make it evidence.<sup>48</sup> An authenticated act done before a notary public in Louisiana in 1838, for the conveyance of lands situate in the republic of Texas, may be approved by a copy authenticated under the act of Congress of March 27, 1804.<sup>49</sup> An exemplified copy of a record of a power of attorney in Virginia was admitted as evidence in the courts of Kentucky.<sup>50</sup> An authenticated copy of a will of another state is admissible.<sup>51</sup> . . . . The records of deeds and mortgages required to be recorded or enrolled are regarded as records within the state in which they are recorded.<sup>52</sup> In the state of New York a mortgage, the execution of which has been duly acknowledged in accordance with the statute relating to such matters, is entitled to be recorded. A statute of that state further provides that the mortgage may be read in evidence without further proof thereof, and that the record or a transcript duly certified may also be read in evidence with like force and effect as the original mortgage. This is a plain provision of the statute. It becomes a public record of that state, standing for all purposes with as full force and effect as the original. The record, without further proof under this statute, is entitled in this state to as full credit as the original would be. A certified copy of the record has the like force and effect in evidence as the original. It is classified by the statute as a conveyance, and it not only operates as notice, but it is an instrument pertaining to a muniment of title; it is *prima facie* evidence of its existence and of the subject-matter therein contained as between the parties to the mortgage and their privies. Any other holding would render the statute as to its operative effect nugatory, and it is to such records as evidence it would seem that the constitution refers when it declares full faith and credit shall be given to them. Under similar statutes to that in the state of New York, the records of deeds and mortgages are treated as evidence when the question arises within the jurisdiction of the states where they are found. They are proved in evidence by the admission of certified copies; they are not merely records made for convenience and notice, but the record is

<sup>48</sup> Pennell v. Weyard, 2 Harr. (Del.) 502.

<sup>49</sup> Watrous v. McGrew, 16 Tex. 506; White v. Burnley, 20 How. 235.

<sup>50</sup> Rochester v. Toler, 4 Bibb (Ky.) 106.

<sup>51</sup> McIntire v. Funk, 5 Litt. (Ky.) 33.

<sup>52</sup> Dick v. Balch, 8 Pet. (U. S.) 30; New Jersey, &c. R. Co. v. Suydam, 17 N. J. L. 25.



made after due acknowledgment of execution, and the record as between the parties is made evidence of the existence, execution, the conveyance of the lands therein described, the indebtedness thereby created and the covenants and agreements therein contained, and it is reasonable to conclude that copies of such records, when duly exemplified, should be received in evidence in every other state under the constitution and the act of Congress.”

**§ 1350. Foreign officer—Certificate.**—The certificate of a foreign officer is generally admissible in evidence to prove matters only which it is his duty to record; as to all other matters it is not ordinarily sufficient.<sup>53</sup>

For like reason the certificate of a consul is not evidence of acts which do not come within the sphere of his official duties or of acts not within his personal knowledge.<sup>54</sup>

Thus, where an American consul certified under his seal that the papers of a ship were deposited with him as required by certain admiralty laws, it was held sufficient evidence of that particular fact, but of nothing else.<sup>55</sup>

Nor is a consul's certificate evidence between third persons unless made so by statute expressly or impliedly.<sup>56</sup>

So an American consul at a foreign port has no authority to authenticate a draft drawn by the owner of a ship upon the consignee of such ship at another port.<sup>57</sup> But the certificate of a governor of a foreign island, registered in the admiralty of Martinique, has been held evidence of an order issued by him.<sup>58</sup>

**§ 1351. Admissibility depends on authentication.**—The admissibility in evidence of certified copies of public records and documents depends, so far as the subject now under consideration is concerned, on the sufficiency of the certificate of the officer or custodian. It is not the contents or the body of the transcript which gives it validity; the copy may be strictly accurate; the contents may reveal the character of the document; it may be sufficient to prove all that is

<sup>53</sup> Succession of Justus, 47 La. Ann. 302, 16 So. 841.

<sup>54</sup> Brown v. Independent, The, Crabbe, 54; Obermier v. Core, 25 Ark. 562; People v. Lee, 112 Ill. 113; Newman v. Harris, 5 Miss. (4 How.) 522; Cutter v. Waddingham, 33 Mo. 269; Alice, The, 12 Fed. 293.

<sup>55</sup> United States v. Mitchell, 2 Wash. (U. S.) C. C. 478.

<sup>56</sup> Levy v. Burley, 2 Sumn. (U. S.) 355.

<sup>57</sup> Williams v. Crescent, &c. Ins. Co. 15 La. Ann. 651.

<sup>58</sup> Bingham v. Cabot, 3 Dall. (U. S.) 19.

claimed for it, but it is the authentication required by the act of Congress which gives it validity; if the seal be not affixed or the certificate be defective, it cannot be received as evidence; it is the proper and sufficient certificate of the officer with his seal, when a seal is required, which gives validity to the transcript.<sup>59</sup> The rule is that the mode of authentication prescribed by law must be followed.<sup>60</sup> The rule was aptly stated by one court as follows: "Where faith is given to papers on the credit of an official certificate, or where they are admissible as evidence because they have passed under the critical examination of the officer having charge of the original, 'all of the forms and solemnities required by law should be fully complied with in their authentication. Indeed, there is the strongest reason for insisting upon a strict compliance with the law where papers are in possession of a party who produces them at the trial and which may be liable to alteration, or which may be the subject of fraud or forgery.'"<sup>61</sup> The rule as stated by some courts is that a substantial compliance with the requirements of the law will only be required.<sup>62</sup> As stated by one court: "Where the statute prescribes the mode of authentication, no other mode will do."<sup>63</sup> While a strict or a substantial compliance with the statute is required in the making of certificates, the statutory requirement is not necessarily exclusive, nor does the statute necessarily prescribe one general form for all cases; the purpose of the statute in such cases is only to indicate a certificate that will be sufficient.<sup>64</sup>

**§ 1352. Authentication—By proper person.**—The authentication of a public document or record must be shown to be made by the

<sup>59</sup> *Fry v. State*, 27 Ind. 348; *Edmiston v. Schwartz*, 13 S. & R. (Pa.) 135; *Voris v. Smith*, 13 S. & R. (Pa.) 334; *Christine v. Whitehall*, 16 S. & R. (Pa.) 98; *Harper v. Farmers', &c. Bank*, 7 W. & S. (Pa.) 204; *Eberts v. Eberts*, 55 Pa. St. 110; *Smith v. United States*, 5 Pet. (U. S.) 292; *Farrar v. United States*, 5 Pet. (U. S.) 373; *United States v. Pinson*, 102 U. S. 548; *United States v. Bell*, 111 U. S. 477; *Ewing v. United States*, 3 App. D. C. 353.

<sup>60</sup> *United States v. Harrill*, 1 McAll. C. C. 243; *Ewing v. United States*, 3 App. D. C. 353.

<sup>61</sup> *Newell v. Smith*, 38 Wis. 39.

<sup>62</sup> *Piatt v. People*, 29 Ill. 54.

<sup>63</sup> *Allen v. Thaxter*, 1 Blackf. (Ind.) 399; *Phelps v. Tilton*, 17 Ind. 423; *Tull v. David*, 27 Ind. 377; *Weston v. Lumley*, 33 Ind. 486; *Board, &c. v. May*, 67 Ind. 562; *Painter v. Hall*, 75 Ind. 208; *Board, &c. v. Hammond*, 83 Ind. 453; *Bills v. Keesler*, 36 Mich. 69; *Wood v. Knapp*, 100 N. Y. 109.

If the statute requires a certificate to include the acknowledgment of a recorded deed, this requirement must be complied with. *Gentry v. Garth*, 10 Mo. 226.

<sup>64</sup> *Bills v. Keesler*, 36 Mich. 69; *Manly v. Culver*, 20 Tex. 143.

proper person. It must be sufficient to show that the person making it is the one authorized to do so either as the person named or as the person having the custody or control of the original record or document. A copy authenticated by a person appointed for that purpose is admissible in evidence to prove the contents of the original.<sup>65</sup>

It must be made to appear that the officer who gives the certificate has the custody of the documents and that he is authorized to certify them.<sup>66</sup> It has been held, however, that the official character of a person who certifies a record may be proved by parol.<sup>67</sup>

**§ 1353. Certificate — Form and sufficiency.**—There are usually two principal forms of certificates used by public officers and custodians in certifying to records, documents or papers. The usual requirement is that the certificates show that the transcript contains a full, true and complete copy of the record, document or paper. Another class of certificates is that in relation to any matter or thing pertaining to the office of the custodian or person certifying, without stating that the transcript is a copy. A certificate may relate to a matter or thing without giving a copy of it; if it states that such and such are the contents of a thing and such and such are not it may answer all requirements. A certificate of a public officer must often relate to some thing or matter, record or document of which he cannot give a copy and of which a copy is not required.<sup>68</sup> Where the statute requires a certificate to show or the officer to certify "a

<sup>65</sup> *United States v. Johns*, 1 Wash. (U. S.) C. C. 363; *Taylor v. Simmons*, 75 Ga. 13; *Morris v. Patchin*, 24 N. Y. 394; *Cooper v. Armstrong*, 4 Kans. 30; *Schnertzell v. Young*, 3 Harris & McH. (Md.) 502; *Kirkland v. Smith*, 14 La. 252 (252); *Mart. N. S.*) 497 (7 *Martin* 252); *Wells v. Taylor*, 3 Day (Conn.) 489; *Barret v. Godshaw*, 75 Ky. 592; *Foxcroft v. Crooker*, 40 Me. 308; *Manning v. Hogan*, 26 Mo. 570; *Dyer v. Snow*, 47 Me. 254; *Woods v. Banks, &c.* 14 N. H. 101; *Whitehouse v. Bickford*, 29 N. H. 471; *Ferguson v. Clifford*, 37 N. H. 86; *Farrar v. Fessenden*, 39 N. H. 268; *Homans v. Corning*, 60 N. H. 418; *State v.*

*Cake*, 24 N. J. L. 516; *Coolidge v. New York, &c. Ins. Co.* 14 Johns. (N. Y.) 408; *State v. Lawrence*, 64 N. Car. 483; *Devling v. Williams*, 9 Watts (Pa.) 317; *Hockenbury v. Carlisle*, 1 Watts & S. (Pa.) 282; *York v. Gregg*, 9 Tex. 85; *Andrews v. Marshall*, 26 Tex. 212.

<sup>66</sup> *Bleaker v. Bond*, 3 Wash. (U. S.) C. C. 529; *N. Y. Dry Dock v. Hicks*, 5 McLean (U. S.) 111; *Taylor v. Kilgore*, 33 Ala. 214; *Galvin v. Palmer*, 113 Cal. 46; *Thompson v. Mason*, 4 Ill. App. 452.

<sup>67</sup> *Hall v. Bishop*, 78 Ind. 370.

<sup>68</sup> *Doe v. Roe*, 16 Ga. 521; *Henderson v. Hackney*, 16 Ga. 521; *Henderson v. Hackney*, 23 Ga. 388; *Perkins v. Dixon*, 1 Rob. (La.) 413.

full, true and complete transcript of the record," it is not a sufficient compliance with the statute to certify that "the foregoing is a true transcript of the proceedings had in said cause, as appears by the record books."<sup>69</sup> Under the same requirement it is not sufficient to certify that "the foregoing is truly copied from the records of the Board of Commissioners."<sup>70</sup> Nor is it sufficient to say that the copy is a true copy.<sup>71</sup> A certificate stating that "the foregoing is a true and correct copy of an election at the time and place and for the purposes therein specified," was held sufficient in connection with other evidence identifying the record.<sup>72</sup> And it was held sufficient that a certificate stating that the above is "a true and correct transcript of the record of the proceedings in this cause as the same remain of record in my office" was good, as it clearly imported a complete transcript.<sup>73</sup> So it has been held that a true copy imports another copy.<sup>74</sup> It is held to be no objection to the admissibility of the evidence that the record from the transcript appears to be incomplete where the certificate is insufficient in form and substance.<sup>75</sup> Where a certificate to a deposition stated that papers annexed thereto were true copies of papers and extracts in the case of a certain vessel, this was held to be sufficient, as it would be presumed by the court that the copies so certified were copies of all that was on file and not mere abstracts.<sup>76</sup>

**§ 1354. Form of certificate—Separate copies.**—The question has sometimes been raised as to the form and sufficiency of a certificate where there are separate and several copies. Public officials are too frequently disposed to sacrifice proper and sufficient certificates in the interest of what they may deem valuable time. A fundamental rule in this respect is that separate and several copies should be so certified as to make it difficult, if not impossible, for an interested party to

<sup>69</sup> Tull v. David, 27 Ind. 377.

<sup>70</sup> Weston v. Lumley, 33 Ind. 486.

<sup>71</sup> Board, &c. v. May, 65 Ind. 562; Painter v. Hall, 75 Ind. 208; Board, &c. v. Hammond, 83 Ind. 453.

<sup>72</sup> Piatt v. People, 29 Ill. 54; Wood v. Knapp, 100 N. Y. 109.

<sup>73</sup> Butler v. Owen, 7 Ark. 369.

<sup>74</sup> Edmiston v. Schwartz, 13 S. & R. (Pa.) 135; Voris v. Smith, 13 S. & R. (Pa.) 334; Butler v. Owens, 7 Ark. 369.

<sup>75</sup> Voris v. Smith, 13 S. & R. (Pa.) 334; Christine v. Whitehall, 16 S. & R. (Pa.) 98; Updegraff v. Perry, 4 Pa. St. 291; Harper v. Farmers', &c. Bank, 7 W. & S. (Pa.) 204; Reber v. Wright, 68 Pa. St. 471; Bonesteel v. Sullivan, 104 Pa. St. 9; Ferguson v. Harwood, 7 Cranch (U. S.) 408.

<sup>76</sup> Lee v. Thorndike, 2 Met. (Mass.) 313; Reber v. Wright, 68 Pa. St. 471.

remove bodily a single copy, or to substitute others in the place of any original copy. Where this question was raised it was held that where all of the sheets were attached together at the top by mucilage, and also by brass fasteners or brads, and the certificate on one of the separate sheets so attached, it was sufficient.<sup>77</sup> Where the same question was again raised, and it appeared that some ten separate and several deeds were fastened together in one bundle by means of brass fasteners, and the certificate of the register of deeds, sufficient in itself, was attached to the entire bundle, it was held insufficient, and in passing on the question the court said: "A certificate annexed to each document or record will not always afford perfect protection against fraud or mutilation; but it is manifestly some security against tampering with papers. In the present case, the papers were in the possession of the plaintiff, and were produced by him on the trial; and, while there may be no ground for imputing to him any attempt to alter any of them, or to disconnect and substitute others, yet it is apparent that this can be more readily done as they now are than where each instrument is authenticated by itself. And we have no doubt that correct practice requires that each record or document should thus be authenticated. And where faith is given to papers on the credit of an official certificate, or where they are admissible as evidence because they have passed under the critical examination of the officer having charge of the original, 'all the forms and solemnities required by law' should be fully complied with in their authentication. Indeed, there is the strongest reason for insisting upon a strict compliance with the law where papers are in the possession of a party who produces them at the trial, and which may be liable to alteration, or which may be the subject of fraud or forgery."<sup>78</sup> This rule is not intended to apply to a transcript of court records that is made up in a chronological order; but even these records should be made in a reasonably substantial and permanent manner, so that there may be a presumption, at least, that they constitute the record authenticated.<sup>79</sup>

While the Wisconsin rule has been denied in some jurisdictions, the courts doing so admit a distinction in the particular cases, and hold that it does not apply where transcripts of several records of the same class are applied for at the same time by a party for use as evidence

<sup>77</sup> Little Rock, &c. Co. v. Hodge, 112 Ga. 521, 37 S. E. 743.

<sup>78</sup> Sherburne v. Rodman, 51 Wis. 474.

<sup>79</sup> Newell v. Smith, 38 Wis. 39; Dill v. White, 37 Wis. 617.

in the same cause. But the rule is emphasized that, if the certificate sufficiently and separately identifies each separate copy, it will be sufficient.<sup>80</sup>

§ 1355. **Certifying to conclusions—Effect.**—It is not sufficient for the officer or custodian of legal documents to make his own statement of what he pleases to say appears by the record; and the mere certificate by such officer that a certain fact appears of record in the absence of a copy of the record is not evidence of the existence of such fact. The duty of deciding what the record contains and proves rests with the court, and not with the certifying officer.<sup>81</sup> And in the absence of a statute specifically designating what facts may be certified, the custodian or officer of public records cannot certify to results, abstracts or items of a record.<sup>82</sup> So, the certificate of an officer of a foreign state, to the effect that a will was produced in open court, proved by the subscribing witnesses duly recorded and on file in his office, is not a sufficient certificate in the absence of the copy of the record.<sup>83</sup> So, the certificate of a jailer of the death of a prisoner is not legal evidence of the fact.<sup>84</sup> And a certificate of the secretary of state that a grant is not recorded in his office is not legal evidence.<sup>85</sup> But it has been held that a certified statement of an account filed as a mechanic's lien is prima facie evidence of the facts which it recites.<sup>86</sup> The authentication of naturalization papers by a clerk is sufficient.<sup>87</sup>

§ 1356. **Deputy officer—Power to certify.**—Some trouble and confusion have arisen in courts over the question of the power of a deputy

<sup>80</sup> *City of Portland v. Besser*, 10 Ore. 242

<sup>81</sup> *Martin v. Anderson*, 21 Ga. 301; *Owen v. Boyle*, 15 Me. 147; *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *McGuire v. Sayward*, 22 Me. 230; *Atwood v. Winterport*, 60 Me. 250; *Wayland v. Ware*, 109 Mass. 248; *Commonwealth v. Richardson*, 142 Mass. 71; *Major v. Watson*, 73 Mo. 661; *Francis v. Newark*, 58 N. J. L. 522; *State v. Champion*, 116 N. Car. 987.

<sup>82</sup> *New Milford v. Sherman*, 21 Conn. 100; *Hopkins v. Millard*, 9 R. I. 37; *Treasurers, &c. v. Witsall*, 1 Spear (S. Car.) 220; *United States v. Patterson, Gilp.* (U. S.)

44; *Hoyt v. United States*, 10 How. (U. S.) 108; *United States v. Edwards*, 1 McLean (U. S.) 467; *United States v. Ganssen*, 19 Wall. (U. S.) 213; *Fagan v. United States*, 24 Ct. Claims, 217. But there are cases in which an officer may certify, or at least testify, that an alleged instrument is not recorded in his office.

<sup>83</sup> *Cornelison v. Browning*, 9 B. Mon. (Ky.) 50.

<sup>84</sup> *Gill v. Phillips*, 6 Mart. N. S. (La.) 298.

<sup>85</sup> *Ayres v. Stewart*, 1 Tenn. 220.

<sup>86</sup> *Stuart v. Broome*, 59 Tex. 466.

<sup>87</sup> *Canfield v. Bullock*, 18 B. Mon. (Ky.) 494.

officer to certify to copies of documents. This arises from the fact that some deputies have too high an appreciation of their positions and forget that they are agents of the principals, authorized to execute instruments in their names. The rule is that, when a deputy makes a certificate, it should be executed by him in the name of the officer.<sup>88</sup> Ordinarily, a deputy has no power to certify in his own name.<sup>89</sup> But, where it is made to appear by the evidence that an officer is authorized to appoint a deputy, and that such deputy has power to perform the duties of the officer during his absence or inability, it has been held that, in case of a certificate made by such deputy, it will be presumed to have been made by reason of a vacancy, or because of absence or inability of the officer. But such a certificate should show that the deputy is the actual custodian of the record or document.<sup>90</sup> Nor will a party be permitted to go behind the certificate of a judge to inquire into the authority of a deputy to certify in the name of his principal.<sup>91</sup> But some of the later cases hold that a deputy cannot certify to judicial records in his own name, and that the certificate of the judge that the attestation is in due form will not cover the defect.<sup>92</sup> Parol proof has been held admissible to show that the person making the certificate was a deputy.<sup>93</sup>

**§ 1357. Presumption of regularity.**—Where documents or records are certified under the seal of another state, a presumption of regularity usually arises in the absence of any evidence to the contrary. And in such cases it has also been held that it will also be presumed that the law of the state from which the document is certified on the question of method of authenticating records is the same as that of the state where it is offered in evidence.<sup>94</sup>

<sup>88</sup> *Greasons v. Davis*, 9 Iowa, 219; *Byington v. Allen*, 11 Iowa, 3; *Garden City Sand Co. v. Miller*, 157 Ill. 225; *Rives v. Rives*, 27 Ky. (4 J. J. Marsh.) 533; *Lesasier v. Dashie*, 14 La. 664; *State v. Clark*, 46 La. Ann. 1409, 16 So. 374; *Grant v. Levan*, 4 Pa. St. 393; *Steinke v. Graves*, 16 Utah, 293.

<sup>89</sup> *Young v. Thayer*, 1 Greene (Iowa), 196.

<sup>90</sup> *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753.

<sup>91</sup> *Young v. Thayer*, 1 Greene (Iowa), 196.

In New York it has been held that a certificate of a judge as to the authority of any person other than the clerk was of no force. But this was in the absence of any showing of the power or authority of the deputy to act. *Morris v. Patchin*, 24 N. Y. 394.

<sup>92</sup> *Willock v. Wilson*, 178 Mass. 68.

<sup>93</sup> *Hall v. Bishop*, 78 Ind. 370.

<sup>94</sup> *State v. Lawson*, 14 Ark. 114; *Pillow v. Roberts*, 13 How. (U. S.) 472, 12 Ark. 822; *Roberts v. Pillow*, 1 Hempst. 624.

## CHAPTER LXVI.

### JUDICIAL RECORDS—AUTHENTICATION.

Sec.		Sec.	
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1366.	Foreign judgments—Common law authentication.		
1367.	By judge—When no clerk.		

§ 1358. **Admissibility in evidence—Act of Congress.**—By virtue of the authority of the constitution Congress has provided for the authentication of judicial records and proceedings for the purpose of making certified copies admissible in evidence in the various state courts of the United States. The act of Congress on this subject is as follows: "The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the



said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.”<sup>1</sup>

**§ 1359. Authentication—Certificate by clerk and judge.**—No particular form of certificate to be made by the clerk is prescribed by the act of Congress to entitle the judicial records of one state to be admitted in evidence in the courts of another state. It is sufficient where the clerk attests the copy of the record with the seal of the court, if a seal is required, together with the certificate of the presiding judge that such attestation of the clerk is in due form. When the subject matter attested by the clerk shows itself to be a matter of record, it is the certificate of the judge in such cases that gives validity to the transcript of the record and establishes the validity of the form adopted by the clerk, and every objection is met when the judge certifies that the attestation was in due form. This rule, however, applies only to documents which the law presumes to be matters of record, such as judgments and probates of wills, but as to matters not presumed to be of record the rule obtains that the certificate of a clerk must show his authority for acting.<sup>2</sup> Under this rule it has been held that the judge is not required to certify to the identity of the clerk, nor is he required to state that the person who certifies the records is the clerk of the court, or that the seal attached is the seal of the court; he is only required to certify that the attestation is in due form.<sup>3</sup> It is unnecessary under the United States statutes for the clerk to certify to the identity of the judge or that he was duly commissioned and qualified. Nor is it necessary that the governor of the state certify to the official

<sup>1</sup>U. S. R. S. §905; 2 Desty Fed. Proc. § 425.

<sup>2</sup>Mitchell v. Mitchell, 3 Stew. & P. (Ala.) 81; McRae v. Stokes, 3 Ala. 401; Lee v. Hamilton, 3 Ala. 529; White v. Strother, 11 Ala. 720; Smith v. Blagge, 1 Johns. Cas. (N. Y.) 238; Ferguson v. Harwood, 7 Cranch (U. S.) 408; Thompson v. Manrow, 1 Cal. 428; Low v. Burrows, 12 Cal. 181; Ducommun v. Hysinger, 14 Ill. 249; Darrah v. Watson, 36 Iowa, 116; Harryman v. Roberts, 52 Md. 64; Boswell v. Cutter, 117 Mass.

69; Young v. Chandler, 13 B. Mon. (Ky.) 252; Young v. Thayer, 1 Greene (Iowa) 196; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; McCormick v. Deaver, 22 Md. 187; Capen v. Emery, 5 Met. (Mass.) 436; Dwight v. Richardson, 2 Sm. & M. 325; Capling v. Herman, 17 Mich. 524; Green v. Sarmento, 1. Pet. (U. S.) (C. C.) 74; Weeks v. Downing, 30 Mich. 4. See post § 1363.

<sup>3</sup>Ducommun v. Hysinger, 14 Ill. 249.

character of the judge.<sup>4</sup> But the official character of the judge, and the fact as to whether he is the chief judge, or otherwise, must appear from his certificate. An added certificate by the clerk that the judge certifying is the judge, or that he is the sole judge of the court, adds no weight whatever to an otherwise defective certificate.<sup>5</sup>

**§ 1360. Judge's certificate—Test of sufficiency.**—Under the act of Congress the test of sufficiency of the judge's certificate is measured by the requirements of the law of the state or place from which the record is taken. His certificate must therefore be as to the fact of the sufficiency of the attestation under the forms in use in the state from which the record comes.<sup>6</sup> Where the certificate does not conform to the requirements of the act of Congress, it must then be tested by the law of the place or state where the record is offered in evidence, and unless it meets the statutory requirements of the place of trial the proof should be by an examined copy, and the witness appear either in person or by deposition and show that he compared the copy with the original and that the transcript is true and correct.<sup>7</sup>

**§ 1361. Clerk's authority.**—The clerk in making his certificate for the admissibility of records as evidence under the act of Congress derives his authority from the federal law, and not from state laws; the validity of the certificate is not due to the official character of the person making it under state laws, but solely by virtue of the act of Congress prescribing this particular mode of proof in certain cases.<sup>8</sup>

**§ 1362. Certificate—Sufficiency under state laws.**—The several states are bound by the act of Congress as to the sufficiency of the authentication of the records of different states to the extent that they cannot deny or prevent the admission in evidence of documents authenticated and certified under the congressional act. But this

<sup>4</sup> Kinsley v. Rumbough, 96 N. Car. 193.

<sup>5</sup> Pratt v. King, 1 Ore. 49; 1 Greenleaf Ev. § 661. See, also, Gardner v. Lindo, 1 Cranch (U. S.) C. C. 78.

<sup>6</sup> Ferguson v. Harwood, 7 Cranch (U. S.) 408; Smith v. Blagge, 1 Johns. Cas. (N. Y.) 239; Morris v. Patchin, 24 N. Y. 394; Lewis v. Sutliff, 2 Greene (Iowa) 186. See,

also, Craig v. Brown, 1 Pet. (U. S.) 354.

<sup>7</sup> Hackett v. Bonnell, 16 Wis. 417. See § 1366.

But there are authorities to the effect that a record of a court cannot be proved by a witness. Rex v. Inhabitants of Castell, 8 East 78; State v. McElmurray, 3 Strob. (S. Car.) 33.

<sup>8</sup> Morris v. Patchin, 24 N. Y. 394.

does not prevent the several states from enacting laws providing for the admissibility in evidence of public documents and records where the authentication is different from and less strict than that provided by the act of Congress, although they cannot impose any additional requirements than those required by the act of Congress. In other words, the act of Congress is not exclusive.<sup>9</sup>

Some of the states have provided that the records and judicial proceedings of any court of any state or territory of the United States shall be admissible in evidence in all cases when duly authenticated by the attestation of the clerk having charge of the records of such court, with the seal of the court annexed.<sup>10</sup>

The act of Congress does not prevent the records of sister states from being proved or established by any competent proof known to the common law.<sup>11</sup> Thus, in some states, the certificate of the judge, whether or not he is the chief justice or presiding magistrate, is sufficient.<sup>12</sup> No authentication of public documents to make them admissible as evidence in any courts of any of the states, however, can be required other than what would be sufficient in courts of the United States.<sup>13</sup>

**§ 1363. Due form—Judge's certificate conclusive.**—It is indispensable, under the act of Congress, that the judge should state in his certificate that the attestation of the clerk is in due form. By

<sup>9</sup> *Torbert v. Wilson*, 1 Stew. & P. (Ala.) 200; *Goodwyn v. Goodwyn*, 25 Ga. 203; *Latterette v. Cook*, 1 Iowa, 1; *Roop v. Clark*, 4 Greene (Iowa) 294; *Simons v. Cook*, 29 Iowa, 324; *Ordway v. Conroe*, 4 Wis. 45; *Garden City, &c. Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; *Dean v. Chapin*, 22 Mich. 275; *Karr v. Jackson*, 28 Mo. 316; *Chamberlin v. Ball*, 15 Gray (Mass.) 352; *Kingman v. Cowles*, 103 Mass. 283; *Knapp v. Abell*, 10 Allen (Mass.) 485; *People v. Miller*, 195 Ill. 621, 63 N. E. 504; *Parke v. Williams*, 7 Cal. 247; *Wickersham v. Johnson*, 104 Cal. 407, 38 Pac. 89; *Porter v. Beville*, 2 Fla. 528; *Title Guarantee, &c. Co. v. Trenton, &c. Co.* 56 N. J. Eq. 441; *Otto v. Trump*, 115 Pa. St. 425; *State v. Hinchman*, 27 Pa. St.

485; *Kean v. Rice*, 12 S. & R. (Pa.) 208; *Ellmore v. Mills*, 1 Hayw. (N. Car.) 359; *Pryor v. Moore*, 8 Tex. 250; *Council Bluffs Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376.

<sup>10</sup> *Gribble v. Pioneer Press Co.* 15 Fed. 689; *Sawyer v. Garcelon*, 63 Me. 25; *Frost v. Holland*, 75 Me. 108; *Young's Minn. R. S.*, p. 800, § 54.

<sup>11</sup> *Baker v. Field*, 2 Yates (Pa.) 532; *Snyder v. Wise*, 10 Pa. St. 157; *Otto v. Trump*, 115 Pa. St. 425; *Eaton v. Hasty*, 6 Neb. 428; *Snyder v. Critchfield*, 44 Neb. 66.

<sup>12</sup> *Latterette v. Cook*, 1 Iowa, 1; *Torbert v. Wilson*, 1 Stew. & P. (Ala.) 200; *Simons v. Crook*, 29 Iowa, 324.

<sup>13</sup> *Wickliffe v. Hill*, 13 Ky. (3 Litt.) 330.

the use of the term "due form" in such certificate of the judge is meant that such attestation is according to the form prescribed for the court where the proceedings were had, and not that the attestation is according to the form used in the state where the record is to be used as evidence. For these reasons the certificate of the presiding judge is made the only evidence that such form has been properly complied with, and no evidence can be received contradictory to the certificate for the purpose of showing that the attestation is not in due form.<sup>14</sup>

But it has been held that the certificate of the judge that the attestation is in due form will not be sufficient when the attestation itself shows that it is not in due form. Thus, where it showed that the certificate was by a deputy in his own name, it was held that the certificate of the judge that the attestation was in due form and in the handwriting of the clerk did not cure the defect, because the judge is only authorized to certify that the attestation is in due form.<sup>15</sup>

The judge's certificate to the clerk's authentication should not be

<sup>14</sup> *McRae v. Stokes*, 3 Ala. 401; *Andrews v. Flack*, 88 Ala. 294; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *English v. Smith*, 26 Ind. 445; *Gatling v. Robbins*, 8 Ind. 184; *Ducommun v. Hysinger*, 14 Ill. 249; *Simons v. Cook*, 29 Iowa, 324; *Stephenson v. Bannister*, 3 Bibb (Ky.) 369; *Barbour v. Watts*, 2 A. K. Marsh. (Ky.) 290; *Tipton v. Mayfield*, 10 La. (O. S.) 493; *Duvall v. Ellis*, 13 Mo. 203; *Wilburn v. Hall*, 16 Mo. 426; *Grover v. Grover*, 30 Mo. 400; *Hutchins v. Gerrish*, 52 N. H. 205; *Shown v. Barr*, 33 N. Car. 296; *Edwards v. Jones*, 113 N. Car. 453; *Reber v. Wright*, 68 Pa. St. 471; *Ferguson v. Harwood*, 7 Cranch (U. S.) 408; *Drummond v. Magruder*, 9 Cranch (U. S.) 122; *Green v. Sarimento*, 1 Pet. (U. S.) 74; *Craig v. Brown*, 1 Pet. (U. S.) 352; *Tooker v. Thompson*, 3 McLean, 92; *Schoonmaker v. Lloyd*, 9 Rich. (S. Car.) 173; *Coffee v. Neely*, 13 Rich. (S. Car.) 304; *Ordway v.*

*Conroe*, 4 Wis. 45; *Clark v. Depew*, 25 Pa. St. 509; *Trigg v. Conway*, 1 Hems. (U. S.) 538; *Smith v. Blagge*, 1 Johns. Cas. (N. Y.) 238; *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1; *Brackett v. People*, 64 Ill. 170; *Horner v. Spelman*, 78 Ill. 206; *McMillan v. Lovejoy*, 115 Ill. 498; *Garden City, &c. Co. v. Miller*, 157 Ill. 225; *Young v. Thayer*, 1 Greene (Iowa) 196; *Lewis v. Sutliff*, 2 Greene (Iowa) 186; *Roop v. Clark*, 4 Greene (Iowa) 294; *Haynes v. Cowen*, 15 Kans. 637; *Weeks v. Downing*, 30 Mich. 4; *Willock v. Wilson*, 178 Mass. 68; *Norwood v. Cobb*, 20 Tex. 588; *Johnson v. Rannels*, 9 Mart. (La.) 621; *Ripple v. Ripple*, 1 Rawle (Pa.) 386; *Bryan v. Farnsworth*, 19 Minn. 239; *Grover v. Grover*, 30 Mo. 400; *Tittman v. Thornton*, 107 Mo. 500.

<sup>15</sup> *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757. But see *Steimke v. Graves*, 16 Utah, 293, 52 Pac. 386.

on loose or detached pieces of paper, but should be annexed to the record.<sup>16</sup> It should show that the judge making the certificate was the proper judge at the time he so certifies.<sup>17</sup> And it should show the official character of the clerk and his authority to act at the time of the date of his certificate.<sup>18</sup> The question of the sufficiency of the certificate is one, in the first instance, for the decision of the trial court; and the admission of the certified copy in evidence is a decision by the court that the certificate is sufficient.<sup>19</sup>

**§ 1364. Certificate by judge or presiding officer.**—The certificate of the judge to the attestation of the clerk is required by the act of Congress to be by the judge, chief justice or presiding magistrate. While the certificate need not be in the precise language of the statute, yet, when there is a departure from the statutory form, the language adopted must not be equivocal, and must clearly convey the idea that the certificate is by the judge, chief justice or presiding magistrate.<sup>20</sup> Under this statute it has been held that where the judges of a court preside in turn, the presiding justice is the proper one to certify.<sup>21</sup> But a certificate by a judge styling himself as first justice is insufficient,<sup>22</sup> or as senior judge.<sup>23</sup> So the certificate of a judge of the court of another state must show that he

<sup>16</sup> *McFarlane v. Harrington*, 2 Bay (S. Car.) 555; *Hurt v. McReynolds*, 20 Tex. 595.

<sup>17</sup> *United States v. Biebusch*, 1 Fed. 213.

<sup>18</sup> *Johnson v. Howe*, 2 Stew. (Ala.) 27; *English v. Smith*, 26 Ind. 445; *Gavit v. Snowhill*, 26 N. J. L. 76.

<sup>19</sup> *Barret v. Godshaw*, 75 Ky. 592.

<sup>20</sup> *Hudson v. Daily*, 13 Ala. 722; *Geron v. Felder*, 15 Ala. 304; *Low v. Burrows*, 12 Cal. 181; *Morris v. Patchin*, 24 N. Y. 394; *People v. Smith*, 121 N. Y. 578, 24 N. E. 852; *Pratt v. King*, 1 Ore. 49; *Phillips Ev. (Cow. & Hill No.)* p. 1131, n. 771; *Coffee v. Neely*, 13 Rich. (S. Car.) 304; *Van Storch v. Griffin*, 71 Pa. St. 240; *Bennet v. Bennet*, 1 Deady (U. S.) 299; *Haynes v. Cowen*, 15 Kans. 637; *Stephenson v. Bannister*, 6 Bibb (Ky.) 369; *Ar-*

*nold v. Frazier*, 5 Strob. (S. Car.) 33; *Bates v. McCully*, 27 Miss. 584; *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757; *United States v. Biebusch*, 1 McCrary (U. S.) 42; *Smith v. Brockett*, 69 Conn. 492, 38 Atl. 57; *Westerman v. Sheppard*, 52 Neb. 124, 71 N. W. 950.

<sup>21</sup> *Taylor v. Kilgore*, 33 Ala. 214; *Hudson v. Daily*, 13 Ala. 722; *Simons v. Cook*, 29 Iowa, 324; *Stephenson v. Bannister*, 3 Bibb (Ky.) 369; *Stewart v. Swansey*, 23 Miss. 502.

Where a judge in his certificate styled himself as "President of the District Court, &c.," it was held a sufficient designation of himself as the presiding magistrate. *Gavit v. Snowhill*, 26 N. J. L. 76.

<sup>22</sup> *Hudson v. Daily*, 13 Ala. 722.

<sup>23</sup> *Stephenson v. Bannister*, 3 Bibb (Ky.) 369.

was judge of the particular court from the records of which the transcript was taken.<sup>24</sup> It has been held, however, a sufficient authentication where a judge in his attestation is described as the judge of the court without saying that he is the judge, or sole judge, in the absence of anything appearing on the face of the record from which it could be inferred that the court was composed of more than one judge.<sup>25</sup> And where the certificate states that the judge certifying is the sole judge, it need not state or show that he is the chief justice or presiding magistrate.<sup>26</sup>

But where there is more than one judge, or where there is a chief justice, or a presiding judge, and the law requires the certificate to be made by him, it must appear that it was so made.<sup>27</sup> And the judge's certificate must show that the county, the records of the court of which are certified, is in the district over which he presides.<sup>28</sup> And it must show that the person signing as judge was the judge, chief justice or presiding magistrate at the time he so made the certificate.<sup>29</sup>

It has been held that a certificate of a district judge of a United States court was sufficient without any showing as to the absence of the circuit judge.<sup>30</sup>

**§ 1365. Records of chancery courts.**—The records of courts of chancery fall under the same rule, as to their authentication, as records of other courts. A chancellor is a judge of a court of chancery, and where he certifies to the attestation of the clerk and that it is in due form, he certifies as a judge or presiding magistrate and the attestation, in that respect, is sufficient.<sup>31</sup>

<sup>24</sup> *Brown v. Johnson*, 42 Ala. 208; *Holly v. Flournoy*, 54 Ala. 99; *Johnson v. Howe*, 2 Stew. (Ala.) 27; *Settle v. Alison*, 8 Ga. 201; *Capen v. Emery*, 5 Met. (Mass.) 436; *Lothrop v. Blake*, 3 Pa. St. 483; *Pratt v. King*, 1 Ore. 49; *Keyes v. Mooney*, 13 Ore. 179, 9 Pac. 400; *Barlow v. Steel*, 65 Mo. 611; *Moyer v. Lyon*, 38 App. (Mo.) 635.

<sup>25</sup> *Butler v. Owen*, 7 Ark. 369; *Central Bank, &c. v. Veasey*, 14 Ark. 671; *Dismutes v. Musgrove*, 2 La. 335.

<sup>26</sup> *State (Ohio) v. Hinchman*, 27 Pa. St. 479.

<sup>27</sup> *Kirkland v. Smith*, 2 Mart. N. S. (La.) 497; *Morris v. Patchin*, 24 N. Y. 394.

<sup>28</sup> *Elliott v. McClelland*, 17 Ala. 206; *Williams v. Williams*, 53 Mo. App. 617.

<sup>29</sup> *United States v. Biebusch*, 1 Fed. 213.

Nor is it sufficient for the judge to certify that he is the judge who presided at the trial, or that he is the senior judge of the court. *Van Storch v. Griffin*, 71 Pa. St. 240.

<sup>30</sup> *Stephens v. Bernays*, 119 Mo. 143.

<sup>31</sup> *Scott v. Blanchard*, 10 Mart. N.

### § 1366. Foreign judgments — Common law authentication.

Judgments and records of foreign courts cannot be admitted in evidence without some proper or sufficient authentication. By the rules of the common law such judgments are authenticated; (1.) by the exemplification under the court seal; (2.) by a copy proved to be a true copy; (3.) by the certificate of an officer authorized by law, which certificate must be properly authenticated. Experience has shown that one of these methods is usually attainable, and that civilized countries have proper facilities for furnishing such exemplifications. It was said by the Supreme Court of the United States, in an early case,<sup>32</sup> "that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation would be rejected, unless the fact should appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy." The law does provide that if all of these methods are beyond the reach of the party, then, in a proper case, their testimony, inferior in its nature, may be received. But the impediments to the use of either of these modes should be clearly shown, as the court will not presume that they exist.<sup>33</sup>

Records authenticated according to the common law modes are admissible in evidence notwithstanding the acts of Congress. These acts do not make the methods prescribed by them the only mode of proving records; they do not abolish the common law rule.<sup>34</sup>

S. (La.) 159; *Barbour v. Watts*, 2 A. K. Marsh. (Ky.) 290; *Hunt v. Lyle*, 8 Yerg. (Tenn.) 142; *Patrick v. Gibbs*, 17 Tex. 275.

<sup>32</sup> *Church v. Hubbard*, 2 Cranch (U. S.) 187, 237.

<sup>33</sup> *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Stewart v. Swansey*, 23 Miss. 502; *Hutchins v. Gerrish*, 52 N. H. 205; *Francis v. Ocean Ins. Co.* 6 Cow. (N. Y.) 404, 429; *Lincolen v. Battelle*, 6 Wend. (N. Y.)

475; *Dougherty v. Snyder*, 15 S. & R. (Pa.) 87; *Church v. Hubbard*, 2 Cranch (U. S.) 187, 237; *Consequa v. Willings*, 1 Pet. (U. S.) 225; *Seton v. Delaware Ins. Co.* 2 Wash. C. C. (U. S.) 175; *Boehtlinck v. Schneider*, 3 Esp. 58; *Knapp v. Abeil*, 10 Allen (Mass.) 485; *People v. Miller*, 195 Ill. 621, 63 N. E. 504.

<sup>34</sup> *Goodwyn v. Goodwyn*, 25 Ga. 203; *Karr v. Jackson*, 28 Mo. 316; *Capling v. Herman*, 17 Mich. 524;

A foreign judgment to be admissible in evidence in any court must, in the absence of any provision to the contrary, be in such form and with such a sufficient authentication as would render it admissible in evidence in any domestic court of the country in which it was rendered.<sup>35</sup>

It was held to be a sufficient authentication of a foreign judgment where a copy of a judgment of a court at Havana was signed by the clerk of the court, who was the proper custodian; that his signature validated all its proceedings; that the court had no seal; that the seal of the royal college of notaries was attached to the certificate, and that the authentication was the customary manner of authenticating records for foreign countries.<sup>36</sup>

§ 1367. **By judge—When no clerk.**—In some jurisdictions there are courts where the offices of judge and clerk are filled by one person. In such cases the manner of certifying to the records of such courts has given rise to confusion and antagonism in the decisions of various courts. The weight of authority and the better reasoning support the proposition in such cases that the certificate should be made by such judge as the clerk, and then as such judge he should certify that his attestation as such clerk is in due form, and when so authenticated the record is admissible in evidence.<sup>37</sup>

Dean v. Chapin, 22 Mich. 275; Kean v. Rice, 12 S. & R. (Pa.) 203; Ex parte Povall, 3 Leigh (30 Va.) 816; Title Guarantee, &c. Co. v. Trenton, &c. Co. 56 N. J. Eq. 441; Gribble v. Pioneer Press Co. 15 Fed. 689; Ellmore v. Mills, 1 Hayw. (N. Car.) 359; Etz v. Wheeler, 23 Mo. App. 449.

<sup>35</sup>Leay v. Wilson, 1 Cranch (U. S.) 191.

<sup>36</sup>Packard v. Hill, 7 Cow. (N. Y.) 434; Hill v. Packard, 7 Wend. (N. Y.) 391; Picard v. Bailey, 26 N. H. 152; Mahurin v. Bickford, 6 N. H. 567; Rolfe v. Dart, 2 Taunt. 52; McNeil v. Sheriffs of London, 1 Esp. 263; Gyles v. Hill, 1 Camp. 471; Fyson v. Kemp, 6 Car. & P. 71.

An exemplification of the proceedings of a tribunal at Havre was not sufficient, and must be

proved as other matters of fact. Delafield v. Hand, 3 Johns. (N. Y.) 310.

But a copy of the decree of a court of vice-admiralty at Antiqua, which was certified by the actuary in the absence of the deputy registrar in admiralty, together with proof by deposition of the seal affixed to the sentence, and of the signature and official character of the person who signed and certified the decree, was held to be a sufficient authentication. Gardere v. Columbian Ins. Co. 7 Johns. (N. Y.) 514.

<sup>37</sup>Spencer v. Langdon, 21 Ill. 192; Sherwood v. Houston, 41 Miss. 59; Duvall v. Ellis, 13 Mo. 203; State (Ohio) v. Hinchman, 27 Pa. St. 479; Washabaugh v. Entriken, 34 Pa. St. 74; Cox v. Jones, 52 Ga. 438; Pagett



While the act of Congress providing for the authentication of records contemplates that the court shall have a clerk and a judge, there is nothing in the act that even suggests that these officers shall be the same or different persons. From the fact that the act contemplates the existence of a clerk, the presumption is that the court is a court of record, and where the judge is *ex officio* clerk, as is common especially in probate courts, the certificate setting forth these facts and signed by the judge is generally held sufficient.<sup>38</sup> The certificate of the judge of the court as to its powers and the motives of organization, *prima facie* may be accepted as true; if the fact be different, the burden of producing the law and showing it to be otherwise should be on the other party.<sup>39</sup> In any event, the judge must state that the certificate is in due form, and he may make one certificate as clerk and one as judge, but he must sign both.<sup>40</sup> But one certificate has been held to be sufficient.<sup>41</sup>

**§ 1368. Records of federal courts—Exemplification.**—The act of Congress providing for the exemplification of records and judicial proceedings and their admissibility in evidence in state courts, was designed to carry into effect the first section of the fourth article of the Constitution. But the terms of the Constitution and of the statute are limited to records and judicial proceedings of the several state courts and do not apply to the federal courts; and it has been

*v. Curtis*, 15 La. Ann. 451; *Keith v. Stiles*, 92 Wis. 15, 64 N. W. 860.

But in the case of such certificates it is indispensable that the judge certify that his attestation as clerk is in due form. *Duvall v. Ellis*, 13 Mo. 203; *Rowe v. Barnes*, 101 Iowa, 302, 70 N. W. 197; *Sally v. Guntèr*, 13 Rich. (S. Car.) 72.

The following form, signed by the judge as both judge and clerk, was held sufficient: "I, W. S. Boname, county judge in and for said county, do hereby certify that the above and foregoing hereto attached are true and perfect copies of the petition, summons, and exhibits, being all of the files in the case of *Keith Bros. & Co.*, a corporation organized under the laws of

Illinois, is plaintiff, and *Henry Martin, Frank Stiles, and James Myers*, a firm of partners doing business as *Martin, Stiles & Co.*, and *James D. Myers*, defendants. I further certify that I am sole and only presiding judge and *ex officio* clerk of said court, and that this certificate is in due form of law." *Keith v. Stiles*, 92 Wis. 15, 64 N. W. 860.

<sup>38</sup> *Cox v. Jones*, 52 Ga. 438; *Thomas v. Tanner*, 6 Mon. (Ky.) 53; *Ripple v. Ripple*, 1 Rawle (Pa.) 386.

<sup>39</sup> *Cox v. Jones*, 52 Ga. 438.

<sup>40</sup> *Cox v. Jones*, 52 Ga. 438; *Sloan v. Wolfsfeld*, 110 Ga. 70; *Rowe v. Barnes*, 101 Iowa, 302.

<sup>41</sup> *Welder v. McComb*, 10 Tex. Civ. App. 85.

held the rule as to exemplification does not follow.<sup>42</sup> The test is found in the determination of the question as to whether or not the several federal courts are regarded as foreign or domestic in relation to each other. If foreign, the same rule of exemplification would apply. If domestic, then all other federal courts of the country are bound to respect and receive when exemplified under the seal of any one court; and such seal is presumed to be known and establishes itself the same as that of each court within any one state. But it has been frequently held that the several federal courts are domestic in relation to each other, and the rules for exemplification of records and judicial proceeding in domestic courts apply.<sup>43</sup> But it has been held that the records and judicial proceedings of the federal courts to be admissible in evidence in state courts must be exemplified under the act of Congress.<sup>44</sup> A United States district court in Missouri held that the record of a foreign state should be exemplified according to the act of Congress.<sup>45</sup>

<sup>42</sup>Adams v. Way, 33 Conn. 419; Turnbull v. Payson, 95 U. S. 418; Williams v. Wilkes, 14 Pa. St. 228; Jenkins v. Kinsley, C. & C. (N. Y.) 136; Murray v. Marsh, 3 Hayw. (N. Car.) 290; Warren v. Flagg, 2 Pick. (Mass.) 448; Robinson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 N. H. 567; Taylor v. Barron, 30 N. H. 78; Hutchins v. Gerrish, 52 N. H. 205; Church v. Hubbard, 2 Cranch (U. S.) 238.

<sup>43</sup>Mewster v. Spalding, 6 McLean, 24; Womack v. Dearman, 7 Port. (Ala.) 513; Adams v. Way, 33 Conn. 419; Morgan v. New York Nat'l, &c. Assn. 73 Conn. 151; Barber v. International Co. 74 Conn. 652; Smith v. Redden, 5 Harr. (Del.) 321; Mason v. Lawrason, 1 Cranch (U. S.) 190; Williams v. Wilkes, 14 Pa. St. 228; Chamberlin v. Ball, 15 Gray (Mass.) 352; Ladd v. Blunt, 4 Mass. 402; Commonwealth v. Phillips, 11 Pick. (Mass.) 28; Kingman v. Cowles, 103 Mass. 283; Michener v. Payson, 13 N. B. R. 49; Frost v. Holland, 75 Me. 105; McGregor v. Hampton, 70 Mo. App. 98; Brad-

ford v. Russell, 79 Ind. 64. See, also, O'Hara v. Mobile, &c. R. Co. 40 U. S. App. 471.

<sup>44</sup>Adams v. Lisher, 3 Blackf. (Ind.) 241; Redman v. Gould, 7 Blackf. (Ind.) 361; English v. Smith, 26 Ind. 445; Buford v. Hickman, 1 Hemp. (U. S.) 232. In an early case in New York it was held that in an action in a state court a copy of a record of a United States court of another state was admissible in evidence when authenticated as a domestic judgment. Pepoon v. Jenkins, 2 Johns. Cas. (N. Y.) 119; Jenkins v. Kinsley, C. & C. (N. Y.) 136. In Indiana it was held that a transcript of a record of the United States district court for the district of Indiana was admissible in the state courts of that state when authenticated by the clerk with the seal of the court. Bradford v. Russell, 79 Ind. 64.

<sup>45</sup>United States v. Biebusch, 1 McCrary, 42. Compare, however, McGregor v. Hampton, 70 Mo. App. 98; Stephens v. Bernays, 119 Mo. 143.

§ 1369. **Records of state courts — Exemplification.**—As already shown, the act of Congress for the exemplification of records does not apply to the records of the various courts of any one state, or to what are known as domestic courts. The authentication of the records and judicial proceedings of the state courts is simple and less complicated. Generally, the only exemplification required is the certificate of the clerk of the court to the fact that it is a full, true and complete copy of the record which is in his custody by authority of law, together with the seal of the court. The reason of this is that each court is presumed to know and recognize the seal of any other court within the same state, and when the record is exemplified under such seal it proves itself.<sup>46</sup> It is held in some jurisdictions that the clerk need not state that he is the proper or legal custodian of the records, as the seal of the court attached to his certificate attests the possession of the record in the person who certifies.<sup>47</sup> So it has been held that a copy of the proceedings before a United States commissioner will be received in evidence when duly authenticated by such commissioner.<sup>48</sup>

A record of state court certified by the clerk of the court alone, however, has been held insufficient without the certificate of the judge that the attestation of the clerk is in due form.<sup>49</sup>

§ 1370. **Court discontinued—Custodian.**—Where a court has been discontinued, the office of its clerk abolished, and its records transferred to another court, a certificate of the clerk and judge of the latter court to records of the former and stating the fact of the discontinuance and the transfer of the record is sufficient prima facie evidence to admit a transcript of the record in evidence.<sup>50</sup>

<sup>46</sup> *Womack v. Dearman*, 7 Port. (Ala.) 513; *Adams v. Way*, 33 Conn. 419; *Pepoon v. Jenkins*, 2 Johns. Cas. (N. Y.) 119; *Williams v. Wilkes*, 14 Pa. St. 228; *Pryor v. Moore*, 8 Tex. 250; *Mewster v. Spalding*, 6 McLean, 24; *Names v. Names*, 48 Neb. 710; *Comstock v. Kerwin*, 57 Neb. 1; 77 N. W. 387.

<sup>47</sup> *Kingman v. Cowles*, 103 Mass. 284.

<sup>48</sup> *Frost v. Holland*, 75 Me. 108.

<sup>49</sup> *Gardner v. Lindo*, 1 Cranch (U. S.) 78; *Northwestern, &c. Ins. Co. v. Stevens*, 71 Fed. 258; *Smith v.*

*Brockett*, 69 Conn. 492. See *Turnbull v. Payson*, 95 U. S. 418; *Mewster v. Spalding*, 6 McLean, 24; *Bradford v. Russell*, 79 Ind. 64.

<sup>50</sup> *Darrah v. Watson*, 36 Iowa, 116; *Cafen v. Emery*, 46 Mass. (5 Met.) 436; *Thomas v. Tanner*, 6 T. B. Monroe (Ky.) 52; *Gatling v. Robins*, 8 Ind. 184; *Manning v. Hogan*, 26 Mo. 570; *Roop v. Clark*, 4 Greene (Iowa) 294; *Folsom v. Blood*, 58 N. H. 11; 1 *Greenleaf Ev.* § 506; *Tittman v. Thornton*, 107 Mo. 500.

**§ 1371. Wills—Exemplification of record of probate.**—A testamentary paper has no virtue or force as such until duly probated in the proper court; and a will itself after probate is not, ordinarily, admissible in evidence in the absence of the record or evidence of probate. A copy of a will which has been duly probated has no probative force in any court unless attended by the record of probate. Another principle hinged to this is that the probate of a will is a judicial act; therefore the will and its probate become judicial records, and to be admissible in evidence in the courts of states other than that in which it was probated, the record must be duly exemplified and certified under the act of Congress or by the common law rules.<sup>51</sup>

But a mere transcript of a short order of the court to the effect that on a certain day the will was proved and registered and that administration of the estate was granted to certain persons is insufficient, unless it is shown that the procedure in the state or country from which the will came is different from that of the state and court in which it is offered. The pleadings, petitions or proceedings which led up to the order and gave the court jurisdiction should be given to make the record complete.<sup>52</sup> And the record must show on its face that the execution and probate of the will possessed the solemnities required by the laws of the state where the land devised by the will lies.<sup>53</sup>

In order to make such will and its exemplified probate admissible in evidence, they need not, however, be recorded in the state or county of the court in which they are offered.<sup>54</sup>

It is not sufficient that the record be signed by the clerk of the court and his signature attested by the governor of the state; but

<sup>51</sup> *Case v. McGee*, 8 Md. 9; *Balfour v. Chew*, 5 Martin (La.) (N. S.) (8) 639; *Johnson v. Rannels*, 6 Martin (N. S.) (La.) (9) 621; *Succession of Bowels v. Field*, 3 Rob. (La.) 33; *Melvin v. Lyons*, 18 Miss. (10 S. & M.) 78; *Ratcliff v. Ratcliff*, 20 Miss. (12 S. & M.) 134; *Riffe v. Riffe*, 1 Rawle (Pa.) 386; *Bright v. White*, 8 Mo. 421; *Lewis v. City of St. Louis*, 69 Mo. 595; *Bradstreet v. Kinsella*, 76 Mo. 63; *Keith v. Keith*, 80 Mo. 125; *Drake v. Curtis*, 88 Mo. 644; *Dusenberry v. Abbott*, (Neb.)

95 N. W. 466; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Winters v. Laird*, 27 Tex. 616.

<sup>52</sup> *Young v. Rosenbaum*, 39 Cal. 646; *Mason v. Wolff*, 40 Cal. 249; *Harper v. Rowe*, 53 Cal. 234; *Wickersham v. Johnston*, 104 Cal. 407.

<sup>53</sup> *Darby v. Mayer*, 23 U. S. (10 Wheat.) 465. See *Ex parte Povall*, 30 Va. 816.

<sup>54</sup> *Lewis v. City of St. Louis*, 69 Mo. 595; *Drake v. Curtis*, 88 Mo. 644.

it must be attested by the judge of the court and he must certify that the attestation of the clerk was in due form.<sup>55</sup>

**§ 1372. Quasi-judicial records.**—Another class of records which are admissible in evidence either as originals or by certified copy are those partaking somewhat of the character of judicial records. As defined in one case: "They are the results of inquiries made under public authority concerning matters of public or general interest, though the affairs to which they relate may be private. They are generally the conclusions of juries, coroners, commissioners or other officers under oath, and often, though not necessarily, based on evidence taken under oath." The principle upon which this class of records is admissible is that the return or report of persons appointed by law, or under the authority of law, to investigate any matter of fact under oath, not being the foundation of a judgment or judicial decree, is *prima facie* evidence of the matters stated even as against persons not parties to the proceeding. This principle applies to such matters as insanity inquests, coroners' verdicts, surveys, inventories and appraisements.<sup>56</sup>

**§ 1373. Quasi-judicial records—Illustrations.**—A copy of the report of a railway company to the state engineer and surveyor under statutory direction, is admissible in evidence to prove a material admission made by the corporation.<sup>57</sup>

**§ 1374. Records of justice of the peace courts—Authentication.** The greatest difficulties and the greatest contrariety of decisions as to the exemplification of records are found in regard to the records of the courts of justice of the peace. The earlier cases present a line of conflicting decisions as to the method of authentication of such records and their admissibility in evidence in the courts of the states other than that in which the judgment was rendered. One point in the controversy, and, therefore, one ground for the diversity of

<sup>55</sup> *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237.

<sup>56</sup> *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Willoughby v. McClure*, 2 Wend. (N. Y.) 608; *Hart v. Deamer*, 6 Wend. (N. Y.) 498; *Asterhant v. Shoemaker*, 3 Hill (N. Y.) 513; *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 171; *Lawrence v.*

*Haynes*, 5 N. H. 34; *Adams v. Stannan*, 24 N. H. 405; *Seavey v. Seavey*, 37 N. H. 125; *Hayward v. Bath*, 38 N. H. 179; *Thompson v. Major*, 58 N. H. 242; *Derry v. Rockingham County*, 62 N. H. 485; *Pells v. Webquish*, 129 Mass. 469.

<sup>57</sup> *Leonard v. New York R. Co.* 44 N. Y. Super. Ct. 575.

opinion arose on the question as to whether or not such courts were courts of record. Another source of trouble was that in some states such courts were courts of record and in other states they were not. And an added difficulty was that where they were courts of record the justice made his own record, and such courts were without clerks. In the earlier cases there is some agreement that if such courts were courts of record that they came within the act of Congress, and in such cases if the record was authenticated according to the requirements of that act it was sufficient. On this subject one court said: "In those states where justices of the peace hold courts of record, where they are the sole judges and have no other persons to be their clerks, they are the presiding magistrates and clerks of their own courts, and may certify their records in a manner conformable to the act of Congress. After attestation of the record, a justice of the peace may certify that he is the presiding magistrate and clerk of the court, that there is no seal, and that the attestation is in due form, and then subscribe it as justice of the peace. This would be a literal compliance with the act, and the copy of the record so certified would be admissible in evidence."<sup>58</sup> Other courts hold that the record of a justice of the peace cannot be authenticated under the act of Congress to make it admissible in evidence in other states, and these courts generally place such records on the footing with foreign judgments.<sup>59</sup>

§ 1375. **Records of justices—Exemplification.**—The rule stated and generally accepted is that the judicial proceedings of justices of the peace of foreign states are admissible in evidence in the courts of other states when exemplified under the seal of the state, or by a copy proved to be a true copy by a witness who has compared it with the

<sup>58</sup> Bissell v. Edwards, 5 Day, 363; Draggoo v. Graham, 9 Ind. 212; Smith v. Emerson, 16 Ind. 355; Ault v. Zehering, 38 Ind. 429; Bradford v. Russell, 79 Ind. 64; Bryan v. Farnsworth, 19 Minn. 239; Kuhn v. Miller, Wright (Ohio) 127; Starkweather v. Loomis, 2 Vt. 573; Blodget v. Jordan, 6 Vt. 580; Brown v. Edson, 23 Vt. 435.

<sup>59</sup> Burns v. Campbell, 71 Ala. 271; Lunsford v. Dietrich, 86 Ala. 250; Trader v. McKee, 2 Ill. 558; Buntain v. Bailey, 27 Ill. 409; Gay v.

Lloyd, 1 Greene (Iowa) 78; Warren v. Flagg, 2 Pick. (Mass.) 448; Robinson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 N. H. 567; Pickard v. Bailey, 26 N. H. 152; Taylor v. Barron, 30 N. H. 78; Hutchins v. Gerrish, 52 N. H. 205; Thomas v. Robinson, 3 Wend. (N. Y.) 267; Silver Lake Bank v. Harding, 5 Ohio, 545; Snyder v. Wise, 10 Pa. St. 157; Hade v. Brotherton, 3 Cranch C. C. 594. See, also, Wagner v. County Com'rs, 91 Fed. 969.

original; or, as stated by one court, "such records may be proved by testimony as any other facts are proved. The jurisdiction may be shown by the production of the statute conferring it, or by the testimony of those instructed in the laws of the state from which the proceedings came."<sup>60</sup>

The admissibility of certified records of justice of the peace is now controlled almost entirely by special statutes in the several states.<sup>61</sup>

<sup>60</sup> *Commonwealth v. Greene*, 17 Mass. 515; *McElfatrick v. Taft*, 10 Bush (Ky.) 160; *Kean v. Rice*, 12 S. & R. (Pa.) 203; *Freeman Judgments*, § 577.

<sup>61</sup> *Alabama*.—A statement of any judgment rendered by a justice of the peace, made and certified by him, or his successor in possession of his docket, is presumptive evidence of the fact.—Code, § 2679.

*Arkansas*.—Copies of proceedings before justice of the peace, certified by the justice before whom the proceedings were had, shall be evidence of such proceedings.—Dig. of Stat. § 2877. *Gates v. Bennett*, 33 Ark. 475.

*Colorado*.—Copies of the proceedings and judgments before justices of the peace, certified by such justice or justices under their hands and seals, before whom such proceeding or judgment is had, shall be received as evidence of such proceeding or judgment is had, shall certified copy is to be used in any other county than where the justice resides, the same shall not be received as evidence unless a certificate from the county clerk be there-to annexed certifying that on the day the proceeding was had or the judgment rendered, such justice was a justice of the peace, and duly commissioned and sworn.—Mills Ann. Stat. § 1747. *Baur v. Beall*, 14 Colo. 383.

*Florida*.—Copies of the records and judicial proceedings of any

court in this state, or of another state or territory, or of the United States, shall be admissible in evidence in all cases in this state, when authenticated by the attestation of the officer having charge of the records of such court, with the seal of such court annexed. And the recital by the person attesting that he has charge of such records shall be prima facie evidence that he has such charge.—R. S. § 1109. Every justice of the peace shall keep a docket book, in which he shall make fair and accurate entries of all causes brought before him, and a minute of all the proceedings, including the service and return of process the appearance of such parties as may appear, the fact of trial, whether by the court or jury, the verdict of the jury or finding by the justice, the judgment, including damages and costs separately stated, the issuing of execution and to whom issued, with the date thereof and the return thereon, and a marginal memorandum of the items of all costs, including justice's fees, sheriff's or constable's fees, and witnesses' fees; which docket, or a certified copy thereof, shall be evidence of the matters therein stated.—R. S. § 1608.

*Georgia*.—Justices of the peace, and notaries public ex officio justices of the peace, shall furnish to any party interested a certified transcript of any judicial proceed-

It has been deemed proper and desirable to cite these statutes, and

ings had in their respective courts, and may charge such fees as are allowed clerks of the superior courts for similar services.—Code, § 5214. The certified transcript of such judicial proceedings may be used as evidence in any of the courts of this state; but shall not be used outside of the county where certified, until the official character of the officer giving such transcript shall have been certified to by the ordinary of the county.—Code, § 5215.

Illinois, Kansas, Kentucky, Louisiana, Massachusetts, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington and West Virginia have no statutes providing for authentication of records of justices of the peace of foreign states.

Indiana.—Copies of the proceedings and judgments of any justice of the peace of any state or territory of the United States or of the District of Columbia, certified by the justice or justices, under his or their hands and seals, before whom the proceedings were had or judgments rendered, or their successors in office, or other justices having legal custody thereof, that the same are true and complete copies of the proceedings or judgments, with the certificate of the clerk or prothonotary of any court of record of the county or district where said justice or justices shall hold his or their office or offices, certifying, under the seal of said court, that the justice or justices was or were at the time when the proceedings were had or judgments rendered, and when the copy was taken, duly commissioned and qual-

ified to act as such shall be admissible in any of the courts of this state.—Burns' R. S. 1901, § 462. See *Collier v. Collier*, 150 Ind. 276, 49 N. E. 1063.

Iowa.—The official certificate of a justice of the peace of any of the United States, to any judgment, and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceeding and judgment.—R. S. § 4059 (2439). *Railroad Bank v. Evans*, 32 Iowa, 202. A justice can certify to a record of a predecessor in his possession, but the clerk's certificate must show that the justice resides within the county, and that the justice certifying was such at the time he so certifies. *Guesdorf v. Gleason*, 10 Iowa, 495; *Railroad Bank v. Evans*, 32 Iowa, 202.

Maine.—The records and proceedings of any court of the United States, or of any state, authenticated by the attestation of the clerk, or officer having charge thereof, and by the seal of such court, are evidence.—R. S. of Maine, 1903, p. 753, § 122.

Maryland.—An exemplification of the record, under the hand of the keeper of the same and the seal of the court or office where such record may be made, shall be good and sufficient evidence in any court of this state to prove any debt of record made or entered in any other of the United States, or in any foreign country.—Public Gen. Laws, p. 699, § 36.



to state the substance of the statutes of the different states upon the

Michigan.—The records and judicial proceedings of any court in the several states and territories of the United States in any foreign country shall be admitted in evidence in the courts of this state, upon being authenticated by the attestation of the clerk of such court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed.—Compiled Laws (10145) § 34. Copies of such records and proceedings, in the courts of a foreign country, may also be admitted in evidence upon due proof:

1. That the copy offered has been compared by the witness with the original, and is an exact copy of the whole of such original;

2. That such original was in the custody of the clerk of the court, or other officer legally having charge of the same; and,

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be.—(10146) § 35.

The preceding sections shall not prevent the proof of any record or judicial proceeding of the courts of any foreign country, according to the rules of the common law, in any other manner than that herein directed, nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as therein prescribed.—(10147) § 36. *Capling v. Herman*, 17 Mich. 524.

Minnesota.—An exemplification of a judgment rendered by any justice of the peace, in any state or territory of the United States, officially certified by such justice or

his successor in office as a full and correct copy of all the proceedings in that case from his docket, with a certificate of magistracy thereon, signed and authenticated by a clerk of a court of record in the county where such judgment was rendered with the seal thereof attached, is evidence, in any court in this state, to prove the facts contained in such exemplification.—R. S. Minn. 1891, § 5143. *Bryan v. Farnsworth*, 19 Minn. 239.

Mississippi.—Copies of the record of any conveyance of land under a judgment of a justice of the peace and of the record of a certified transcript of the proceeding had before the justice, and of the record of the execution and return thereon, authorized by law to be recorded with such conveyance, when certified by the clerk in whose office the record is kept, under his seal of office, shall be received as prima facie evidence of the validity of such deed and proceedings without further proof of the same.—Ann. Code, § 1780 (2211).

Missouri.—Has no statute providing for the authentication of records of a justice of the peace, but it is held in that state that the judgment of a justice of a foreign state may be proved by witnesses produced and sworn who have compared the copy offered in evidence with the original judgment on the docket of the justice, together with proof of the statute under which the court was held giving it jurisdiction, and that the justice rendering the judgment was in fact an acting justice of the peace. *Winham v. Kline*, 77 Mo. App. 36; *Etz v. Wheeler*, 23 Mo. App. 449; *McElpatrick v. Taft*, 10 Bush (Ky.)

subject, for the reason that, as already shown, there are many juris-

160. The justice who rendered the judgment is a competent witness for the purpose of showing that the exemplification of his record is in due form and valid, according to the laws of the state in which it was rendered. *Holdridge v. Marsh*, 30 Mo. App. 352.

Montana.—A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.—Code Ann. § 3195.

Nebraska.—The official certificate of a justice of the peace of any of the United States, to any judgment, and the preliminary proceeding before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature of his certificate is genuine, is sufficient evidence of such proceedings and judgment.—Cobbey's Ann. Stat. § 1400.

Nevada.—A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court, or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.—Compiled Laws, § 3527.

New York.—A transcript from the docket-book of a justice of the peace, within an adjoining state, of a judgment rendered by him; a transcript of his minutes of the proceedings in the cause, previous to the judgment; or of an execution issued thereon; or of the return of an execution, when subscribed by the justice, and authenticated as prescribed in the next section, is presumptive evidence of his jurisdiction in the cause, and of the matters shown by the transcript.—Stover's N. Y. Ann. Code, § 948. Such a transcript must be authenticated by a certificate of the justice, annexed thereto, to the effect, that it is in all respects correct, and that he had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county, in which the justice resided at the time of rendering the judgment, under his hand and the seal of the court of common pleas, or other county court of the county, to the effect that the person, subscribing the certificate attached to the transcript, was, at

dictions in which it is held that the record of a justice of the peace

the date of the judgment, a justice of the peace of that county, and that the signature thereto is in his own handwriting. (§ 949.) The judgment and other proceedings, and the justice's authority to render the judgment, may also be proved, by the production of the docket, or of a copy of the judgment or other proceedings, and the oral testimony of the justice, to the truth and correctness thereof, and to his authority to render the judgment. (§ 950.) Under this statute it has been held that an adjoining state must be one that lies contiguous to the state of New York; that, therefore, the remedy as to such records from other courts is unaffected as the plaintiff can prove his judgment under the common law rules without the assistance of the code. *Bent v. Glaenzer*, 17 Misc. 569, 75 N. Y. St. 58, 40 N. Y. Supp. 657; *Thomas v. Robinson*, 3 Wend. (N. Y.) 267.

**Oregon.**—A transcript from the record or docket of a justice of the peace of a sister state, of a judgment given by him, of the proceedings in the action or proceeding before the judgment and subsequent thereto, if any, verified in the manner prescribed in the next section, is primary evidence of the facts stated therein.—*Bellinger & Cotton's Ann. Codes & Stat.* § 758. There shall be attached to the transcript a certificate of the justice having the legal custody of the record or docket, that the transcript is in all respects correct and complete, and that the justice who gave the judgment had jurisdiction of the action, together with the certificate of the clerk of the county, having official cognizance of the

fact, in which the justice resided at the time of giving the judgment, under the seal of his office, that the person certifying the transcript was, at the date thereof, a justice of the peace in the county, and that the signature is genuine. § 759.

**Pennsylvania.**—In all suits or causes where it shall be necessary for either party to give in evidence the proceedings had before a justice or justices of the peace or alderman of any other state, a transcript of the docket, proceedings or record of the said justice or justices or alderman, certified by the same, respectively, verified by the certificate of the clerk or prothonotary of a court of record in the city or county wherein the said justice or alderman has jurisdiction, under the seal of the court, setting forth the official character and authority of the said justice or alderman, attested by the judge thereof, shall be legal evidence of the judgment entered in such case.—1 *Pepper & Lewis' Dig.* p. 1894, § 20.

**Tennessee.**—The official certificate of a justice of the peace of this state, or of any of the United States, to any judgment, and the preliminary proceedings before him, with the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is evidence of such proceedings and judgment.—*Code of Tennessee*, § 5581.

**Utah.**—A transcript from the record or docket of a justice of the peace of another state, or of a territory, of a judgment rendered by

of another state cannot be authenticated under the act of Congress so as to make it admissible in those states, and the matter, therefore, depends almost entirely upon local statutes.

him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.—R. S. § 3390. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice is a resident at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court or court of general jurisdiction thereof, certifying that the person the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings and jurisdiction may also

be proved by the justice himself, on the production of his docket, or by a copy of a judgment, and his oral examination as a witness.—§ 3391.

Wisconsin. — An exemplification of a judgment rendered by any justice of the peace or other magistrate holding a court not of record of any state or territory of the United States shall be admissible in evidence in all cases in this state when authenticated by the certificate of such justice or his legal successor, having custody of his books and papers, that the same has been by him compared with the original, and is a full and correct copy from the docket or other legal record of all the proceedings in the case, with a certificate of magistracy affixed, signed by the clerk of a court of record in the county where such judgment was rendered, under the seal of such court.—Wis. Stat. § 4145.

## CHAPTER LXVII.

### SEAL—USE IN EXEMPLIFICATIONS.

Sec.	Sec.
1376. Presence of seal affixed—Effect.	1380. Seal—Necessary to proper authentication.
1377. Seal—Judicial notice.	1381. Seal—Excuse for not using.
1378. Seal—Character and impression.	1382. Effect of use of seal—Presumption.
1379. Seal — Statutory requirements.	1383. Notary public—Use of seal.

§ 1376. **Presence of seal affixed—Effect.**—The affixing of a seal in the authentication of records is regarded as the highest evidence of the authenticity of the records so certified. From time immemorial the presence of a seal has been so regarded. “The public national seal of a kingdom, or sovereign state, is by common consent and usage of civilized communities the highest evidence and the most solemn sanction of authenticity in relation to proceedings, either diplomatic or judicial, that is known in the intercourse of nations, and as such is taken notice of judicially by courts of justice in other states.”<sup>1</sup> And, as said in another case, “the seal is, in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy as to the officer entitled to affix the seal, which is a regulation very different in different states.”<sup>2</sup> This rule as applied to judicial records and proceedings of courts of foreign countries, has been more or less limited in this country for the

<sup>1</sup> *Griswold v. Pitcairn*, 2 Day (Conn.) 85; *Anonymous*, 9 Mod. 66; *Green v. Waller*, 2 Ld. Raym. 891; *Edison Electric, &c. Co. v. United States, &c. Co.* 35 Fed. 134; *Allen*

*v. Thaxter*, 1 Blackf. (Ind.) 399; *Conkey v. Conder*, 137 Ind. 441.

<sup>2</sup> *United States v. Johns*, 4 Dal. (U. S.) 412; *Church v. Hubbart*, 2 Cranch (U. S.) 187; *United States v. Amedy*, 11 Wheat. (U. S.) 292.

reason, perhaps, that laws have been passed governing the particular subject. It has been frequently decided and is universally regarded that the seal of a state or of the Nation proves itself.<sup>3</sup>

The seal of an unacknowledged government or of a new government will not prove itself; but it may be proved by such testimony as the nature of the case admits of; and the fact that a person or vessel is in the employ of such country or government may be proved without proving the seal.<sup>4</sup>

In one early case the court said: "It is undoubtedly a general rule, that every country recognizes the seals of its own tribunals without any further proof accompanying them. The reason is evident, because it is taken for granted that the seals of these courts are of such public notoriety, as to carry with them intrinsic evidence of their verity. . . . Among the acts of public officers abroad, those of a notary public are, perhaps, the only acts partaking of such universality as to be generally received in courts of justice. The liberal extension of the rule of evidence, in this instance, the intercourse between merchants has rendered indispensable. The evil consequences resulting from the doctrine contended for on the part of the plaintiff, are too evident to require many observations to evince the impropriety and danger of receiving the attestations of foreign tribunals in evidence in our courts. Of what notoriety can such a seal be in this country? The extension of the rule insisted on by the plaintiff would open the avenues of fraud and imposition in our courts, and, in many cases, prove ruinous to parties. For these reasons we think that such attestations should be received by the court as other matters of fact, and subject to the same rules of evidence."<sup>5</sup>

§ 1377. Seal—Judicial notice.—In England it was held that the court could not take judicial notice of the seal of the Island of Granada, and that it was not sufficient to prove the judgment which it purported to authenticate.<sup>6</sup> As stated by one court, "the seal of the

<sup>3</sup> State v. Carr, 5 N. H. 367; Dunlap v. Waldo, 6 N. H. 450; Lord v. Staples, 23 N. H. 448; Watson v. Walker, 23 N. H. 496; Griswold v. Pitcairn, 2 Conn. 85; Lincoln v. Battelle, 6 Wend. (N. Y.) 484; Church v. Hubbard, 2 Cranch (U. S.) 187, 238; United States v. Johns, 4 Dall. (U. S.) 412.

<sup>4</sup> United States v. Palmer, 3

Wheat. (U. S.) 635; Estrella, The, 4 Wheat. (U. S.) 304; Appendix, 1 Baldwin C. C. (U. S.) 616.

<sup>5</sup> Delafield v. Hand, 3 Johns. (N. Y.) 310; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Robinson v. Gilman, 20 Me. 299.

<sup>6</sup> Henry v. Adey, 3 East 221; Moises v. Thornton, 8 Tenn. 303.

court of a foreign country requires proof; but the seal of the sovereign power of a nation proves itself, and gives authenticity to instruments certified under it.<sup>7</sup> But in courts of admiralty, by common consent and general usage, the seal has been considered as sufficiently authenticating the records of these courts, and objections have never prevailed against receiving decrees of a court acting under the law of nations when established by its seal. The reason given for this rule in these courts is that the seal is deemed to be evidence of itself, because they are considered as courts of the whole civilized world, and every person interested as a party.<sup>8</sup> Courts take judicial notice that the seals of their own states and countries are what they purport to be.<sup>9</sup> And they take judicial notice of the seals of courts of sister states.<sup>10</sup> But courts do not take judicial notice of the seals of officers of foreign governments as distinguished from the seals of the governments themselves.<sup>11</sup>

§ 1378. **Seal—Character and impression.**—In earlier times wax or some other adhesive substance was used, upon which the seal of a public officer might be impressed. The use of such materials has long since ceased to be regarded as important. In the absence of positive law it is sufficient that the impress of the seal is made upon the paper itself in such manner as may be readily identified upon inspection. The impress of the seal must be sufficient for identification. In a United States court the whole subject is covered and the court say: "Formerly wax was the most convenient and the only material

<sup>7</sup> *Ex parte Povall*, 30 Va. (3 Leigh.) 816.

<sup>8</sup> *Griswold v. Pitcairn*, 2 Conn. 91; *Thompson v. Stewart*, 3 Conn. 171; *Gardere v. Columbian Ins. Co.* 7 Johns. (N. Y.) 519; *Mumford v. Bowne. Anth.* (N. Y.) 56; *Yeaton v. Fry*, 5 Cranch (U. S.) 335; *Maria, The*, 1 Robinson, 287, 296; *Green v. Waller*, 2 Ld. Raym. 891; *Dunlap v. Waldo*, 6 N. H. 450. But see *Catlett v. Pacific Ins. Co.* 1 Paine C. C. (U. S.) 594.

<sup>9</sup> *Yount v. Howell*, 14 Cal. 465; *Griswold v. Pitcairn*, 2 Conn. 90; *Barber v. International Co.* 73 Conn. 587; *Robinson v. Gilman*, 20 Me. 299; *Chicago, &c. R. Co. v. Keegan*, 152 Ill. 413; *Rosine v. Bon-*

*nel*, 5 Rob. (La.) 163; *Watson v. Walker*, 23 N. H. 471; *Coit v. Millikin*, 1 Denio (N. Y.) 376; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Hadfield v. Jameson*, 2 Munf. (Va.) 71; *Church v. Hubbard*, 2 Cranch (U. S.) 238; *Yeaton v. Fry*, 5 Cranch (U. S.) 335, 343; *Patterson v. Winn*, 2 Pet. (U. S.) 232, 241; *Schoerken v. Swift, &c. Co.* 7 Fed. 469.

<sup>10</sup> *Adams v. Way*, 33 Conn. 419; *Summer v. Mitchell*, 29 Fla. 179; *Mangun v. Webster*, 7 Gill (Md.) 78; *De Sobry v. De Laistre*, 2 H. & J. (Md.) 191; *Commonwealth v. Snowden*, 1 Brewst. (Pa.) 218.

<sup>11</sup> *Schoerken v. Swift, &c. Co.* 7 Fed. 469.

used to receive and retain the impression of a seal. Hence it was said: 'Sigillum est cera impressa; quia cera, sine impressione non est sigillum.' But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held that an impression made on wafers, or other adhesive substances capable of receiving an impression, will come within the definition of 'Cera impressa.' If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power, on paper, is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed, and where the court can recognize its identity they should not be called upon to analyze the material which exhibits it."<sup>12</sup>

§ 1379. **Seal—Statutory requirements.**—When a statute provides for the use of an official seal, but prescribes no particular form of words, it must contain enough to show the official character of the officer, and must be capable of making a distinct and uniform impression upon the paper on which the certificate is written and to which it is attached.<sup>13</sup> But where the statute provides a particular form, or specifies certain words to be engraved on the seal, these requirements must be strictly complied with, and in such cases the seal of a notary of a sister state must conform to the requirements of the statute of the state of the court where the document is offered in evidence. If it does not, then the law of the state where the certificate was made must be proved to entitle the document to be received in evidence.<sup>14</sup> The impression of the seal can be made directly upon the paper only when the design of the seal is impressed upon the paper itself, and where

<sup>12</sup> *Pillow v. Roberts*, 13 How. (U. S.) 472; *Pierce v. Indseth*, 106 U. S. 546; *Commonwealth v. Griffith*, 2 Pick. (Mass.) 18; *Bradford v. Randall*, 5 Pick. (Mass.) 496; *Tasker v. Bartlett*, 5 Cush. (Mass.) 364; *Bates v. Boston*, &c. R. Co. 10 Allen (Mass.) 251; *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Farmers', &c.*

*Bank v. Haight*, 3 Hill (N. Y.) 493; *Orr v. Lacy*, 4 McLean (U. S.) 243; *Allen v. Sullivan, &c.* R. Co. 32 N. H. 446.

<sup>13</sup> *Oelbermann v. Ide*, 93 Wis. 669, 68 N. W. 393.

<sup>14</sup> *Hewitt v. Morgan*, 88 Iowa, 468, 55 N. W. 478.



the seal was merely an imprint of ink upon the surface of the paper it was held to be neither an impression made directly upon the paper nor an impression upon a wafer, wax, or other similar substance, and was therefore insufficient.<sup>15</sup> The seal with all the words required by the statute must be made by an impression on the paper or document, and it is not sufficient where there is simply an impression on the paper and words written in with pen and ink, nor is it sufficient where the words required are written upon a wafer without an impression.<sup>16</sup> Nor is it sufficient where a seal is required to use a scrawl.<sup>17</sup> And it has been held that, where corporations were required to execute contracts under seal, it was not sufficient where blanks were printed with a facsimile of the seal of the corporation.<sup>18</sup>

**§ 1380. Seal—Necessary to proper authentication.**—Where the law requires that a record or paper to make it admissible as evidence

<sup>15</sup> *Richard v. Boller*, 51 How. Pr. 371, 6 Daly (N. Y.) 460.

<sup>16</sup> *Tunis v. Withrow*, 10 Iowa, 305; *Gage v. Dubuque, &c. R. Co.* 11 Iowa, 310; *Stephens v. Williams*, 46 Iowa, 540; *Goodnow v. Litchfield*, 67 Iowa, 691; *Richard v. Boller*, 6 Daly (N. Y.) 460; *Curtis v. Leavitt* (N. Y.) 1 Smith 9.

<sup>17</sup> *Hinckley v. O'Farrell*, 4 Blackf. (Ind.) 185; *Mason v. Brook*, 12 Ill. 273; *Oelbermann v. Ide*, 93 Wis. 669, 68 N. W. 393; *Muncie Nat'l Bank v. Brown*, 112 Ind. 474; *Miller v. State*, 122 Ind. 355; *Hendee v. Pinkerton*, 96 Mass. (14 Allen) 381; *Hendrix v. Boggs*, 15 Neb. 469; *Sullivan v. Merriam*, 16 Neb. 157; *Douglas v. Oldham*, 6 N. H. 150; *Carter v. Burley*, 9 N. H. 558; *Allen v. Sullivan R. Co.* 32 N. H. 446.

But the Wisconsin court has held the contrary. *Putney v. Cutler*, 54 Wis. 66.

The relative use of a seal and scrawl must not be confused. The seal is required in cases where officers and legal custodians exemptify and authenticate records and documents for use as evidence in foreign courts. But in the execu-

tion of instruments of a private nature, even where they are required to be executed under seal, or where there is a difference between sealed and unsealed instruments, a scrawl or scroll may be adopted; in such cases, whatever the person adopts is his seal; and in many cases it has been held that two or more persons may adopt the same seal or scrawl.

*Hastings v. Vaughn*, 5 Cal. 315; *Tasker v. Bartlett*, 59 Mass. (5 Cush.) 359; *Lunsford v. La Motte Lead Co.* 54 Mo. 426; *Underwood v. Dollins*, 47 Mo. 259; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Michenor v. Kinney*, *Wright* (Ohio) 459; *Howe v. Dawson*, *Tap.* (Ohio) 169; *Hollis v. Pond*, 26 Tenn. (7 Humph.) 221.

But one early case held that even private persons could not use a scroll. *Warren v. Lynch*, 5 Johns. (N. Y.) 239.

<sup>18</sup> *Bates v. Boston, &c. R. Co.* 10 Allen (Mass.) 251; *Hendee v. Pinkerton*, 14 Allen (Mass. (381)); *Allen v. Sullivan, &c. R. Co.* 32 N. H. 446.

shall be certified by the official custodian and attested by the seal of his office, the omission of the seal is fatal, and the document is not admissible.<sup>19</sup> The certificate should make some reference to the seal, sufficient at least to identify it as the seal of the court.<sup>20</sup> But where a certified copy of an instrument is offered in evidence it is no objection that the copy does not show the impression of the seal, as the statute does not contemplate the recording of the impression of the seal of the officer who took the acknowledgment of the deed, but his certificate must show that it was certified under his seal, and it would not be entitled to be recorded without the seal. The officer certifying must use a seal.<sup>21</sup> But it will not be presumed that the word "seal," used in a certified copy, is meant to indicate the existence of the impression of a seal on the original.<sup>22</sup> Where the court knows a seal belongs to the court or office from which the certified copy purports to come it will not be received in evidence in the absence of the seal.<sup>23</sup> Some importance seems to be attached to the location of the seal, and it has accordingly been held that the seal should be annexed to the record and not to the certificate of the judge.<sup>24</sup> But it has also been held that the location or position of the seal is immaterial if it appears on the record, and to whichever certificate the seal stands in juxtaposition the court will consider it annexed to the proper one.<sup>25</sup> It has been expressly held that courts have no power to dispense with the statutory requirements relating to the use of seals.<sup>26</sup> It is suffi-

<sup>19</sup> Hotchkiss v. Glasgow, 5 McLean (U. S.) 424; Alston v. Tayler, 2 N. Car. (1 Hayw.) 381; Chambers v. Jones, 17 Mont. 156, 42 Pac. 758; Thompson v. Mason, 4 Ill. App. 452; Garland v. Britton, 12 Ill. 232; Conkey v. Couder, 137 Ind. 441, 37 N. E. 132.

An exception has been made in case of ancient documents. Crawford, &c. Peerages, 2 H. of L. Cas. 534.

<sup>20</sup> Capling v. Herman, 17 Mich. 524.

In this case the attestation clause declared that the seal was the seal "of our said court of queen's bench for Upper Canada, at Toronto."

<sup>21</sup> Griffin v. Sheffield, 38 Miss. 359; Geary v. City of Kansas, 61 Mo.

378; Huey v. Van Wie, 23 Wis. 613; Benefiel v. Aughe, 93 Ind. 401.

<sup>22</sup> Dickens v. Miller, 12 Mo. App. 408.

<sup>23</sup> Wickliffe v. Hill, 13 Ky. (3 Litt.) 330.

<sup>24</sup> Turner v. Waddington, 3 Wash. C. C. (U. S.) 126.

<sup>25</sup> Foster v. Taylor, 2 Tenn. 191; Coffee v. Neely, 58 Tenn. 304.

<sup>26</sup> Garland v. Britton, 12 Ill. 232; Mason v. Brock, 12 Ill. 273; De Graw v. King, 28 Minn. 118; Colman v. Goodnow, 36 Minn. 9; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Allen v. Thaxter, 1 Blackf. (Ind.) 399; Painter v. Hall, 75 Ind. 208; Conkey v. Couder, 137 Ind. 441, 37 N. E. 132.

cient if, in the attestation, the clerk certifies that the copy of the record or document is given under his seal of office.<sup>27</sup>

§ 1381. **Seal—Excuse for not using.**—Where no seal is used when required it will be sufficient if the certificate itself shows a good cause for its omission.<sup>28</sup> And it has been suggested by high authority that the authentication might be furnished in some other way; but at the same time it was conceded that a failure to use a seal actually provided would be fatal.<sup>29</sup> The court cannot know that there is no seal, and to give the court this information it must be so certified, as otherwise the document could not be received." In other words, the holding is in effect that the law *pr*esumes there is a seal, and this presumption must be overcome.<sup>30</sup> In cases where the seal does not prove itself, as that of foreign judgments, it may be proved by a witness who can testify that the seal is genuine; that he knew the clerk to act in the capacity as such, and that he with the clerk compared the copy. In other words, the record and the seal may be proved by the common law exemplification.<sup>31</sup>

§ 1382. **Effect of use of seal—Presumption.**—Authentication of records of the important public offices of the government is sufficient when made by the great seal of the office, and the official acts under such seals will be recognized and will receive full faith and credit.<sup>32</sup> The annexation of the seal will be presumed to have been made by the person having the custody thereof and competent to do the act.<sup>33</sup>

§ 1383. **Notary public—Use of seal.**—Courts also take judicial notice of the seals of notary publics, for the reason that such officers are recognized by the commercial law of the world.<sup>34</sup> But, where the law requires it, the name of the notary must appear on the seal and be im-

<sup>27</sup> *Coffee v. Neely*, 58 Tenn. 304.

<sup>28</sup> *Craig v. Brown*, 1 Pet. C. C. (U. S.) 352; *Wehrman v. Conklin*, 155 U. S. 314; *Strode v. Churchill*, 12 Ky. (2 Litt.) 75; *Geary v. City of Kansas*, 61 Mo. 378.

<sup>29</sup> *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129.

<sup>30</sup> *Alston v. Taylor*, 2 N. Car. (1 Hayw.) 381, 395.

<sup>31</sup> *Picard v. Bailey*, 26 N. H. 152; *Catlett v. Pacific Ins. Co.* 1 Paine C. C. (U. S.) 594; *Buttrick v. Allen*,

8 Mass. 273; *Gardere v. Columbiana Ins. Co.* 7 Johns. (N. Y.) 519.

<sup>32</sup> *White v. Saint Guirous*, Minor (Ala.) 331.

<sup>33</sup> *Edison Electric, &c. Co. v. United States, &c. Co.* 35 Fed. 134; 1 Phillips Ev. 419.

<sup>34</sup> *Pierce v. Indseth*, 106 U. S. 546; *Townsley v. Sumrell*, 2 Pet. (U. S.) 170; *Nichols v. Webb*, 8 Wheat. (U. S.) 326; *Gallego, The*, 30 Fed. 271; *Kaufman v. Stone*, 25 Ark. 336; *Ashcraft v. Chapman*, 38 Conn. 220;

pressed upon the paper.<sup>35</sup> And in some states the seal of a notary alone is not sufficient to verify and authenticate affidavits made by a notary, but is sufficient in case of bills of exchange and depositions.<sup>36</sup> But the rule is recognized as general to the effect that the ordinary official acts of a notary public are sufficiently authenticated by his seal without further proof.<sup>37</sup> And a certificate of a notary which lacks the authentication of a seal is of no effect.<sup>38</sup> So it has been held that one notary can use the seal of another, as the seal relates to the impression upon the paper, and not to the instrument used in making it.<sup>39</sup> But it has been said that one seal cannot be held to apply to and authenticate each of several notarial acts on the same page.<sup>40</sup> The seal, to entitle it to the dignity of self verification, must be a legal seal answering all the requirements of the law, the impression being made upon the paper; that is, the design of the seal impressed upon the paper itself, and not merely by ink.<sup>41</sup>

Harding v. Curtis, 45 Ill. 252; Doe v. Vandewater, 7 Blackf. (Ind.) 6; Stephens v. Williams, 46 Iowa, 540; Green v. Gross, 12 Neb. 117; Galley v. Galley, 14 Neb. 174; Carter v. Burley, 9 N. H. 558; Cape Fear Bank v. Stinemitz, 1 Hill (N. Y.) 44; Ross v. Bedell, 5 Duer (N. Y.) 462; Chanoine v. Fowler, 3 Wend. 173; Halliday v. McDougall, 20 Wend. (N. Y.) 81; Yarnall v. Hupp, 3 Neb. 1, 90 N. W. 645; Phillips, In re, 14 Nat. B. R. 219; Brown v. Philadelphia Bank, 6 S. & R. (Pa.) 484; Bohn v. Zeigler, 44 W. Va. 402; Denmead v. Maack, 2 McArth. (D. C.) 476; Ex parte Worsley, 2 H. Bl. 275; Hutcheon v. Mannington, 6 Ves. Jr. 823, Cole v. Sherard, 11 Exch. 482 (H. & G.); Cooke v. Wilby, L. R. 25 Ch. D. 769; Las Caygas v. Larionda's Syndics, 4 Mart. (La.) 283.

<sup>35</sup>In re Nebe, 11 Nat'l B. R. 289; In re Phillips, 14 Nat'l B. R. 219; Gray v. Railroad Co. 11 Iowa, 310; Stephens v. Williams, 46 Iowa, 540.

<sup>36</sup>Bohn v. Zeigler, 44 W. Va. 402; Davis's Trusts, In re, 8 Eq. Cas.

98. See, also, Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418; ante Vol. I, § 54. See, as to affidavits, Teutonia Loan, &c. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852; Berkery v. Reilley, 82 Mich. 160, 46 N. W. 436; Trevor v. Colgate, 181 Ill. 129, 54 N. E. 909.

<sup>37</sup>Dunn v. Adams, 1 Ala. 527.

<sup>38</sup>Welton v. Atkinson, 55 Neb. 674; Byrd v. Cochran, 39 Neb. 109; De Graw v. King, 28 Minn. 118; Thompson v. Scheid, 39 Minn. 102; Colman v. Goodnow, 36 Minn. 9; Grimes v. Fall, 81 Minn. 225; Dumont v. McCracken, 6 Blackf. (Ind.) 355.

<sup>39</sup>Muncie Nat'l Bank v. Brown, 112 Ind. 474, 14 N. E. 358.

<sup>40</sup>De Graw v. King, 28 Minn. 118.

In some cases courts held one seal sufficient where only one certificate was required by law. Olcott v. Tioga R. Co. 27 N. Y. 546; State v. Coyle, 33 Me. 427; Osgood v. Sutherland, 36 Minn. 243.

<sup>41</sup>Richard v. Boller, 6 Daly (N. Y.) 460; Bank of Manchester. v. Slason, 13 Vt. 334.

## CHAPTER LXVIII.

### DISCOVERY AND INSPECTION OF DOCUMENTS.

Sec.		Sec.	
1384.	Production of documents for inspection.	1400.	Production—Preparation for trial.
1385.	Common law rule.	1401.	Documents—Books.
1386.	Production—Discovery.	1402.	Documents—Miscellaneous
1387.	Production—Power of court.	1403.	Production — Partnership books.
1388.	Production — Discretion of court.	404.	Inspection of articles and property other than documents.
1389.	Production—Statutory inclusions.	1405.	Production — Public documents.
1390.	Discovery—Notice and practice.	1406.	Inspection — Public documents.
1391.	Application—Form and sufficiency.	1407.	Inspection — Quasi - public documents.
1392.	General requirements as to applications.	1408.	Failure to produce—Excuse.
1393.	Application—Must show materiality.	1409.	Production—Cases of tort.
1394.	Showing materiality—Sufficiency.	1410.	Production—Denied.
1395.	Materiality — Presumption rule.	1411.	Third parties not required to produce books.
1396.	Application—Description of document.	1412.	No production to discover evidence of adversary.
1397.	Application—Possession.	1413.	Privileged documents.
1398.	Application—Necessity.	1414.	The order—Time and place of inspection.
1399.	Production—Framing pleadings.	1415.	Under United States statute.
		1416.	Effect of inspection.

§ 1384. Production of documents for inspection.—Most of the states have statutes providing for the production and inspection of books, papers and documents. No good purpose could be served in a general work of this character by setting out such statutes of the sev-

eral states, as the practice under each is necessarily local. The purpose here is to give the general rules applicable to all jurisdictions either in connection with, or distinct from, the local practice. It is also the purpose to treat this subject as distinct from that of Discovery, except where there are such points of contact as make it difficult or impossible to differentiate principles and cases. In this chapter the inspection of documents, or production of documents for inspection before trial, will be treated, and another chapter will be devoted to the subject of the production of documents at the trial or for use at the trial.

§ 1385. **Common law rule.**—According to the old common law no man was bound to furnish his adversary with evidence to be used against himself.<sup>1</sup> As expressed in the old maxim, derived, perhaps, from the Roman law, “*Nemo tenetur armare adversarium suum contra se.*”<sup>2</sup> In furtherance of this principle, it is said, the old common law generally allowed parties to conceal from each other up to the time of trial the evidence upon which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause.<sup>3</sup> There was, however, from an early date, a right to resort to a court of equity and file a bill of discovery in that court, and in more modern times the practice became established even in the common law courts to make an order for an inspection or copy of a document in the custody or control of the opposite party, where both parties had a joint interest therein and the circumstances were such that the party having it in his possession or control might fairly be deemed a trustee of such document for both parties, and where such document was material to the action or defense of the party who desired the inspection.<sup>4</sup> But it is said that orders for the inspection of documents could not be made by a court of common law except when the document was counted or pleaded on, or might fairly be considered as held in trust for the moving party.<sup>5</sup> Even this, however, apparently fell short of the requirements of justice, and was not deemed entirely satisfactory; and the legislature at length interfered and empowered the superior courts of common

<sup>1</sup> See Anonymous, 3 Salk. 365.

<sup>2</sup> Coke Litt. 36a.

<sup>3</sup> 2 Best Evidence (Morgan's ed.) § 624.

<sup>4</sup> Bluck v. Gompertz, 7 Ex. 67; Rend v. Coleman, 2 Dowl. P. C. 354, 2 Car. & M. 456; Doe dem v.

Slight, 1 Dowl. P. C. 163; Price v. Harrison, 8 C. B. N. S. 617; Steadman v. Ardem, 15 Mees. & W. 587; Kerr Discov. 233.

<sup>5</sup> Union Pacific R. Co. v. Botsford, 141 U. S. 250-254, 11 Sup. Ct. 1000.

law, and each of the judges thereof, on application made for such purpose by either of the litigants in any action, or other legal proceeding pending in any of the said courts, to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous to the passing of that act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge.<sup>6</sup> In the construction of this statute it was held that it did not take away the common law right; so that, in every case in which a party could have obtained inspection before the statute, he might still obtain it, without reference to the statute;<sup>7</sup> and also, that the power conferred on the courts of common law by this statute could only be exercised in cases where the inspection sought for could have been obtained by a bill of discovery or other proceeding in a court of equity, and did not enable them to compel a party to discover whether certain documents, or whether any and what documents relating to the cause, were in his possession or power.<sup>8</sup> Later it was provided<sup>9</sup> that the court or a judge may, at any time during the pendency of any action or proceeding, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just. "But inspection under this enactment will be granted only when it is applied for in a bona fide action; and it will therefore be refused when the court sees that the action has been brought, not to obtain redress from the defendant, but, by means of an application for inspection, to get at evidence to be used in other proceedings against a third party."<sup>10</sup> So,

<sup>6</sup> See 14 & 15 Vic. c. 99, s. 6.

<sup>7</sup> *Bluck v. Gompertz*, 7 Exch. 67; *Sneider v. Mangino*, 7 Exch. 229; *Doe d. Child v. Roe*, 1 E. & B. 279; *Doe d. Avery v. Langford*, 1 Bro. C. C. 37; *Shadwell v. Shadwell*. 6 C. B. N. S. 679.

<sup>8</sup> *Hunt v. Hewitt*, 7 Exch. 236; *Rayner v. Allhusen*, 2 L. M. & P. 605; *Galsworthy v. Norman*, 21 L.

J. Q. B. 70; *Scott v. Walker*, 2 E. & B. 555.

<sup>9</sup> By 17 & 18 Vic. c. 125, s. 50, and by the "Supreme Court of Judicature Act, 1873, 36 & 37 Vic. c. 66, sched. rule 27. And see Rules of Court, under that act, Order 28.

<sup>10</sup> See *Temperly v. Willett*, 6 E. & B. 380.

in granting inspection under this enactment, the court will refuse every application which is merely of a fishing nature.<sup>11</sup> But it will be no answer to an application thereunder, that the documents required to be produced are such as the party is privileged from producing, for if such be the fact, it may be shown in the affidavit to be made in obedience to the rule directing inspection.<sup>12</sup> Again, by the 17 and 18 Vic., c. 125, s. 58, the court or a judge was empowered to grant to either party to an action a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection whereof might be material to the proper determination of the question in dispute. And it was held that this section gave, as ancillary to the power to order inspections, the same power to order the removal of obstructions, with a view of inspection, as was exercised by courts of equity in like cases.<sup>13</sup> It was not, it is said, until the enactment of such statutes that courts of common law exercised the complete control over the subject that they now exercise.<sup>14</sup>

**§ 1386. Production—Discovery.**—It is now generally conceded, if not universally admitted, that the statutes providing for the production and inspection of papers, writings and documents are intended to take the place of, and in many jurisdictions supersede, the old equity practice of a bill of discovery.<sup>15</sup> In New York it was said in an early case: "The object of the statute was to substitute the rule of court in the place of a bill of discovery, where the evidence, of which a discovery is sought, is of a documentary nature; and the remedy is not confined to cases where the evidence in itself constitutes a cause of action, but extends to all books, papers and documents relating to the merits of the suit or defense."<sup>16</sup> The rule previously established in New York was that a party is entitled to the production of papers or documents under the statute when, on a bill of discovery, he could obtain what he asks for, and the paper is necessary to enable him to proceed in his case with safety.<sup>17</sup> The Supreme Court of Rhode Island say:

<sup>11</sup> See *Gomm v. Parrott*, 3 C. B. N. S. 47; *Wright v. Morrey*, 11 Exch. 209; *Shadwell v. Shadwell* 6 C. B. N. S. 679.

<sup>12</sup> *Forshaw v. Lewis*, 10 Exch. 712.

<sup>13</sup> *Bennet v. Griffiths*, 3 E. & E. 467. See *Best on Evidence*, 1050-1052.

<sup>14</sup> See *McQuigan v. Delaware, &c.*

*R. Co.* 129 N. Y. 50-54, 26 Am. St. 507.

<sup>15</sup> But see ante, § 1203.

<sup>16</sup> *Townsend v. Lawrence*, 9 Wend. (N. Y.) 458; *Jacques v. Collins*, 1 Blatchf. (U. S.) 23.

<sup>17</sup> *Lawrence v. Ocean Ins. Co.* 11 Johns. (N. Y.) 241; *Willis v. Bailey*, 19 Johns. (N. Y.) 268; *Wallis v.*



"The application provided for by said statute (which statute is merely declaratory of the common law on that subject) is evidently intended as a substitute for the ancient and more cumbersome method of a bill of discovery for the accomplishing of the same result; and therefore, whenever the application shows a case which would entitle the plaintiff to relief under such a bill, he may have such relief under the statute.<sup>18</sup> Discovery may be had against a corporation and its officers

Murray, 4 Cow. (N. Y.) 399; Townsend v. Lawrence, 9 Wend. (N. Y.) 458; Jackson v. Jones, 3 Cow. (N. Y.) 17; Meakings v. Cromwell, 1 Sandf. (N. Y.) 698; Brevoort v. Warner, 8 How. Pr. (N. Y.) 321.

In the case of *Willis v. Bailey* the court held that an order would not be granted where the paper or document was not the foundation of the action, but was a mere item of evidence. But the case of *Wallis v. Murray* and later cases are all in accord with the prevailing statutory rules of production and inspection.

<sup>18</sup> *Arnold v. Pawtucket, &c. Co.* 18 R. I. 189; *Faircloth v. Jordan*, 15 Ga. 511; *McLeod v. Bullard*, 84 N. Car. 515; *McDonald v. Carson*, 95 N. Car. 377.

As the right to production and inspection under statutory rules is measured by some courts by the right to a discovery under equity rules, some of the cases showing that right and its extent are here given. *Jacques v. Collins*, 1 Blatchf. (U. S.) 23; *Continental, &c. Ins. Co. v. Webb*, 54 Ala. 688; *Handley v. Hiffin*, 84 Ala. 600; *Virginia, &c. Co. v. Hale*, 93 Ala. 546; *Wood v. Hudson*, 96 Ala. 469; *Peck v. Ashley*, 12 Met. (Mass.) 478; *Baker v. Carpenter*, 127 Mass. 226; *Merchants', &c. Bank v. State, &c. Bank*, 3 Cliff. (U. S.) 301; *French v. First Nat. Bank*, 7 Benedict (U. S.) 488; *Heath v. Erie R. Co.* 9 Blatchf. (U. S.) 316; *Russell v.*

*Clark*, 7 Cranch (U. S.) 89; *Bullock v. Boyd*, 2 Marsh. (Ky.) 323; *Buckner v. Ferguson*, 44 Miss. 677; *Kearny v. Jeffries*, 48 Miss. 343; *Treadwell v. Brown*, 44 N. H. 551; *Turner v. Dickerson*, 9 N. J. Eq. 140; *Metler v. Metler*, 19 N. J. Eq. 457; *Shotwell v. Smith*, 20 N. J. Eq. 79; *Hoppock v. United, &c. R. Co.* 27 N. J. Eq. 286; *Howell v. Ashmore*, 1 Stock. (N. J.) 82; *Sweeny v. Williams*, 9 Stew. Eq. 627; *Miller v. U. S. Casualty Co.* 61 N. J. Eq. 110; *Leggett v. Postley*, 2 Paige (N. Y.) 599; *Many v. Beekman Iron Co.* 9 Paige (N. Y.) 188; *March v. Davidson*, 9 Paige (N. Y.) 580; *Deas v. Harvie*, 2 Barb. Ch. (N. Y.) 448; *Gelston v. Hoyt*, 1 Johns. Ch. (N. Y.) 543; *Seymour v. Seymour*, 4 Johns. Ch. (N. Y.) 409; *Adams v. Cavanaugh*, 37 Hun (N. Y.) 232; *Brevoort v. Warner*, 8 How. Pr. (N. Y.) 321; *Shepmoes v. Brownson*, 52 How. Pr. (N. Y.) 401; *Lane v. Stebbins*, 3 Edw. Ch. 480; *Mitchell v. Smith*, 1 Paige (N. Y.) 287; *Burgess v. Smith*, 2 Barb. Ch. (N. Y.) 276; *Baxter v. Farmer*, 7 Indermaur (L. C.) Eq. 239; *Rees v. Parish*, 1 McCord. Ch. (S. Car.) 60; *French v. Rainey*, 2 Tenn. Ch. 640; *Duvals v. Ross*, 2 Munf. (Va.) 290; *Bass v. Bass*, 4 Hen. & Munf. (Va.) 478; *Russell v. Dickeschied*, 24 W. Va. 61; 1 *Pomeroy Eq. § 205*; 2 *Story Eq. §§ 1483-1501*; *Montague v. Dudham*, 2 Ves. 398; *Finch v. Finch*, 2 Ves. 492; *Thomas v. Tyler*, 3 *Younge & C.*

to compel a discovery from its officers.<sup>20</sup> Discovery may be exercised by interrogatories.<sup>21</sup>

§ 1387. **Production—Power of court.**—Many of the statutes expressly empower the court to order the production of papers and documents for inspection and to enforce the same; indeed, this is the very purpose of the statutes. But this power, to a certain extent at least, existed at common law, as developed in modern times, and independently of the statute. The law is stated by the Supreme Court of New Jersey thus: "At common law, and independently of recent statutes, courts of law had the power to order inspection of papers which, by the pleadings or by being used in evidence, came within the control of the court."<sup>22</sup> The English statutes conferred upon the superior common law courts of both Great Britain and Ireland the equitable power to compel the production and

255; Appleyard v. Seton, 16 Ves. 223; Bishop of London v. Fytche, 1 Bro. C. C. 69; Reynell v. Sprye, 8 E. L. & Eq. 35; Hambrook v. Smith, 9 E. L. & Eq. 226; Barnett v. Noble, 1 J. & W. 227; Combe v. Mayor, London, 1 Y. & C. C. C. 631; Llewellyn v. Badeley, 1 Hare, 527; Greenlaw v. King, 1 Beav. 137; Neas v. Northern, &c. R. Co. 3 My. & Cr. 355; Adams v. Fisher, 3 My. & Cr. 526; Goodall v. Little, 1 Sim. A. S. 155; Whitbread v. Gurney, 1 Younge, 541; Beresford v. Driver, 7 E. L. & Eq. 25; Pritchett v. Smart, 7 C. B. 625; Goodliff v. Fuller, 14 M. & W. 4; Goldschmidt v. Marryat, 1 Camp. 559; Hill v. Great Western R. Co. 10 C. B. N. S. 148; McComb v. Chicago, &c. R. 19 Blatchf. (U. S.) 69; Costa Rica v. Erlanger, 1 Ch. & D. 171; Glasscott v. Copper-Miners' Co. 11 Sim. 305; Moodalay v. Morton, 1 Bro. C. C. 469; MacGregor v. East India Co. 2 Sim. 452; Bolton v. Liverpool, 1 Myl. & K. 88; Colgate v. Compagnie Francaise, &c. 23 Fed. 82.

<sup>20</sup> McComb v. Chicago, &c. R. 19 Blatchf. 69; Costa Rica v. Erlanger, 1 Ch. D. 171; Glasscott v. Copper-

Miners' Co. 11 Sim. 305; Moodalay v. Morton, 1 Bro. C. C. 469; MacGregor v. East India Co. 2 Sim. 452; Bolton v. Liverpool, 1 Myl. & K. 88; Colgate v. Compagnie Francaise, &c. 23 Fed. 82.

<sup>21</sup> Dixon v. Fraser, L. R. 2 Eq. 497; Sherlock v. Disney, 13 Ired. Eq. (N. Car.) 233; Hambrook v. Smith, 17 Sim. 209; Rawlins v. Dalton, 3 Y. & C. 447; Macclesfield v. Davis, 3 V. & B. 16; Hancocks v. Lablache, 3 C. P. D. 197; Bovill v. Cowan, 15 W. R. 608; Meader v. Isle of Wight Ferry Co. 9 W. R. 750; Bay State Iron Co. v. Goodall, 39 N. H. 223.

<sup>22</sup> Hilyard v. Township of Harrison, 37 N. J. L. 170; Flemming v. Lawless, 56 N. J. Eq. 138; Cooper v. Cooper, 2 Dev. Eq. 298; Scarborough v. Tunnell, 6 Ired. Eq. (N. Car.) 103; McGibboney v. Mills, 35 N. Car. 163; Woods v. De Figanieri, 25 How. Pr. (N. Y.) 522; Davis v. Dunham, 13 How. Pr. (N. Y.) 425; Stalker v. Gaunt, 12 Leg. Obs. (N. Y.) 132; Iasigi v. Brown, 1 Curt. (N. S.) 401; Lester v. People, 150 Ill. 408, 41 Am. St. 375. note on p. 388; Beckford v. Wildman, 16 Ves. 438.

inspection of documents which were material to the issues.<sup>23</sup> "This power to order the production of documents arises out of that general jurisdiction for the purpose of discovery which, in all proceedings in equity, constitute an important feature; and in some instances, forms as it were, the very foundation for the interference of the court."<sup>24</sup> It thus becomes evident, it is said, that these recent statutes, providing for the production of writings and documents, do not create a new jurisdiction or invest the courts with new powers, but they are to be considered simply as declaratory of the powers of courts of chancery."<sup>25</sup>

**§ 1388. Production—Discretion of court.**—Conceding the power of the court to make such orders, it is admitted under the authorities that the court has a very broad discretion in the matter of requiring the production of particular documents or papers. This discretion, however, it is said, should be liberally exercised in order to enable parties to properly prepare for the trial of a cause. The reasons for the exercise of this discretion vested in the court are stated by Justice Harris in a New York case, where he says: "I can see no good reason why a party should be permitted to withhold from the knowledge of his adversary documentary evidence affecting the merits of the controversy, only to surprise him by its production at the trial. Unless for some satisfactory reason to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers or documents within his power which may contain evidence pertinent to the issue to be tried. If the evidence thus disclosed should be conclusive upon issue the parties may be saved the expense of a trial, and if not, they will come to the trial upon equal terms, each prepared, so far as the evidence within his reach will enable him to do so, to maintain his side of the controversy. This I believe to have been the intention of the legislature, and this I regard as the true construction of their enactment on the subject."<sup>26</sup>

<sup>23</sup> 14 & 15 Vic. c. 99, § 6; 17 & 18 Vic. c. 125, § 50.

<sup>24</sup> Daniels Ch. 1817; Hare Disc. 110.

<sup>25</sup> Hilyard v. Township of Harrison, 37 N. J. L. 170; Ely v. Mowry, 12 R. I. 570; Richey v. Ellis, Alc. & Nap. 111; Thomas v. Dunn, 6 M. & G. 274; Woolmer v. Devereux, 2 M. & G. 758; Stalker v. Gaunt, 12

Leg. Obs. (N. Y.) 132; McAllister v. Pond, 15 How. Pr. 299.

<sup>26</sup> Gregory v. Chicago, &c. R. Co. 10 Fed. 529; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 46; Allison, &c. v. Vaughan, 40 Iowa, 421; Schmidt v. Kiser, 75 Iowa, 457; Powers v. Elmendorf, 4 How. Pr. (N. Y.) 60; Hart v. Ogdensburg, &c. R. Co. 76 N. Y. Super. Ct. 497; Hicks v. Char-

It has been several times held in New York that the matter of granting orders for the examination of parties and for the production of documents rests within the sound discretion of the judges of the supreme court, and that the exercise of this discretion will not, ordinarily, at least, be reviewed by the highest court on appeal.<sup>27</sup> But it has been well said that this power should be used with circumspection, lest it be abused.<sup>28</sup> So, by another court it is said: "The right to inspect private books and papers is sometimes an important one in the administration of justice, and yet the exercise of it is of such a delicate nature that the courts should carefully guard against its abuse. If a party has good reason to believe that a book or paper in the possession of his adversary contains evidence in his favor, and his adversary refuses to allow an inspection of it, and the taking of a copy, the court may, on a proper showing, compel the adversary to allow such inspection and copy. If the document or book be one which, for reasons of public policy or other sufficient reason, the party should not be compelled to exhibit, the exemption may be shown in answer to the rule or order."<sup>29</sup>

**§ 1389. Documents—Statutory inclusions.**—In requiring the production of documents the nature of the instrument must be considered; it must fall within the terms of the statute in each particular case. If the word document only is used, then the instrument desired must fall within the limits of the definition of that term. The

lick, 10 Abb. Pr. (N. Y.) 129; Fenlon v. Dempsey, 12 Abb. Pr. (N. Y.) 291; Perrow v. Lindsay, 52 Hun (N. Y.) 115; Holly Mfg. Co. v. Venner, 86 Hun (N. Y.) 42; Lefferts v. Brampton, 24 How. Pr. (N. Y.) 257; Keeler v. Dusenbury, 1 Duer (N. Y.) 660; Phelps v. Atlantic, &c. Tel. Co. 46 Wis. 266.

The Nebraska statute leaves it to the discretion of the court to grant or refuse an order for inspection of documents and to exclude or not to exclude them at the trial if inspection is not permitted. Chamberlain v. Chamberlain Banking House (Neb.), 93 N. W. 1021.

<sup>27</sup> Glenney v. Stedwell, 64 N. Y. 120; Stilwell v. Priest, 85 N. Y. 649; Clyde v. Rogers, 87 N. Y. 625; Jen-

kins v. Putnam, 106 N. Y. 272; Finlay v. Chapman, 119 N. Y. 404; Pots v. Herman, 7 Misc. (N. Y.) 4; Sibley v. N. Y. Times Pub. Co. 80 Hun (N. Y.) 561, 62 N. Y. St. 537; O'Gorman v. O'Gorman, 36 N. Y. St. 402, 71 N. Y. St. 172; Chamowitz v. Chamowitz, 3 Misc. (N. Y.) 619; Hoyt v. American Exch. Bank, 1 Duer (N. Y.) 652; Boune v. Cribb, 20 Wend. (N. Y.) 682; Jackling v. Edmonds, 3 E. D. Smith (N. Y.) 539; Woods v. De Figanieri, 1 Robt. (N. Y.) 681; Van Zandt v. Cobb, 12 How. Pr. (N. Y.) 544.

<sup>28</sup> Meeth v. Rankin Brick Co. 48 Ill. App. 602.

<sup>29</sup> Whitman v. Weller, 39 Ind. 515, 518, 519.

statutes of some of the states are sufficiently broad to include almost every variety of instruments without any construction. It is not the purpose here to show what records would be included within the terms of any particular statute; but to give the principles and the authorities which apply either to the different statutes themselves, or to the various phases of any one statute, or the rules that might apply under the equity power of the court in the absence of all statutes.

§ 1390. **Discovery—Notice and practice.**—The several statutes providing methods for the production of documents generally make little or no provision for notice of the motion or petition, but seem to contemplate that the order shall go in the first instance without any issue being raised or tried; and if the court adjudges the motion or petition sufficient the order is entered, and the service of a certified copy of the order operates as the notice.<sup>30</sup> The adverse party, however, cannot be denied the right to contest the power of the court to compel the production of the document; hence, he may appear to the motion or petition and make the contest, or he may file an answer in discharge of the rule after the order is entered.<sup>31</sup> In applications for the production of documents under statutes some courts adopt the most simple and expeditious course of procedure, avoiding the formality of a bill of discovery in chancery. Under this practice notice is given to the opposite party of the time and place of the application, together with a plain designation of the papers or documents sought for.<sup>32</sup>

<sup>30</sup> *Parish v. Weed, &c. Co.* 79 Ga. 682; *Hamby Mines v. Findley*, 85 Ga. 431; *Stiger v. Monroe*, 97 Ga. 479; *Bull v. Edward Thompson Co.* 99 Ga. 134; *Georgia Iron Co. v. Etowah Iron Co.* 104 Ga. 395; *Geyger v. Geyger*, 2 Dal. (U. S.) 332; *Thompson v. Selden*, 20 How. (U. S.) 194; *Bank, &c. v. Kurtz*, 2 Cranch (U. S.) C. C. 342; *Hylton v. Brown*, 1 Wash. (U. S.) C. C. 298; *Swedish-Am. Tel. Co. v. Fidelity, &c. Co.* 208 Ill. 562; *Tuttle v. Mechanics', &c. Co.* 6 Whart. (Pa.) 216; *Wertheim v. Continental, &c. Co.* 15 Fed. 716, and notes. See a valuable note to *Lester v. People*, 150 Ill. 408, in 41 Am. St. p. 388.

<sup>31</sup> *Beebe v. Equitable, &c. Asso.* 76 Iowa, 129, 40 N. W. 122; *Smith v. MacDonald*, 1 Abb. N. Cas. 350; *McGuffin v. Dinsmore*, 4 Abb. N. Cas. 241; *Dick v. Phillips*, 41 Hun (N. Y.) 603; *Levey v. New York, &c. R. Co.* 53 N. Y. Super. Ct. 267; *Black v. Curry*, 1 N. Y. Civ. Proc. 193; *Graham v. Hamilton*, 3 Ired. (N. Car.) 381; *McDonald v. Carson*, 95 N. Car. 377; *Congdon v. Aylsworth*, 16 R. I. 281; *Dunham v. Riley*, 4 Wash. (U. S.) C. C. 126.

<sup>32</sup> *Jacques v. Collins*, 1 Blatchf. (U. S.) 23.

§ 1391. **Application—Form and sufficiency.**—Where the statute provides for the production of books and documents, and prescribes the form of the application or motion and designates the contents, the statutory requirements should be strictly complied with.<sup>33</sup> And under some statutes, or in the absence of statutory direction, or under the common law practice, the application may be on motion or by petition. The application, in whatever form, must be verified by the oath of the party, or by some one for him who has actual knowledge of the matters alleged. It has been held that the facts should be stated on positive affirmation, and not on information or belief. The evident reason of this is that nothing short of such positive affirmation will justify a court in compelling the production of the private books and papers of an adverse party on mere suspicion or belief, and placing them at the disposal of the applicant for the purpose of finding some possible evidence in his favor.<sup>34</sup>

§ 1392. **General requirements as to application.**—Although the statutes differ somewhat in various jurisdictions, there are certain things that the moving party must show in nearly every jurisdiction. The most common and important of these will be considered in sepa-

<sup>33</sup> *Beebe v. Equitable, &c. Asso.* 76 Iowa, 129, 40 N. W. 122.

<sup>34</sup> *People v. Rector, &c. Trinity Church*, 6 Abb. Pr. (N. S.) 177; *Opdyke v. Marble*, 18 Abb. Pr. (N. S.) 266; *Walker v. Granite Bank*, 19 Abb. Pr. (N. S.) 111, 44 Barb. (N. Y.) 39; *Johnson v. Consolidated, &c. Co.* 2 Abb. Pr. (N. S.) 413; *Thompson v. Erie R. Co.* 9 Abb. Pr. (N. Y.) (N. S.) 212, 227; *Gould v. McCarty*, 1 Kern. (N. Y.) 575; *Dale v. Stokes*, 5 Redf. (N. Y.) 586; *Exchange Bank v. Monteath*, 4 How. Pr. (N. Y.) 280; *Dole v. Fellows*, 5 How. Pr. (N. Y.) 451; *Brevoort v. Warner*, 8 How. Pr. (N. Y.) 321; *Commercial Bank v. Dunham*, 13 How. Pr. (N. Y.) 541; *Pindar v. Seaman*, 33 Barb. (N. Y.) 140; *Phelps v. Platt*, 54 Barb. (N. Y.) 557; *Wilkie v. Moore*, 17 How. Pr. (N. Y.) 481; *Morrison v. Sturges*, 26 How. Pr. (N. Y.) 177; *Hoyt v. American Ex.*

*Bank*, 1 Duer (N. Y.) 652; *Olney v. Hatcliff*, 37 Hun (N. Y.) 286; *Dickie v. Austin*, 65 How. Pr. (N. Y.) 420; *Rose v. King*, 5 S. & R. (Pa.) 241; *Lovell v. Clarke*, 7 How. Pr. (N. Y.) 158; *Dick v. Phillips*, 41 Hun (N. Y.) 603; *Francis v. Porter*, 88 Hun (N. Y.) 325; *Jenkins v. Bennett*, 40 S. Car. 393; *McDonald v. Carson*, 95 N. Car. 377; *Noonan v. Orton*, 28 Wis. 600; *Caspaay v. Carter*, 84 Fed. 416; *Commissioners v. Lemly*, 85 N. Car. 341; *Ethridge v. Woodley*, 83 N. Car. 11; *McLeod v. Bullard*, 84 N. Car. 515. But see *Leferts v. Brampton*, 24 How. Pr. (N. Y.) 257, where under peculiar circumstances the order was granted, notwithstanding the fact that the affidavit was on information and belief. *United States v. Twenty-eight Packages of Pros. Gilp.* (U. S.) 306; *Jacques v. Collins*, 1 Blatchf. (U. S.) 23.

rate sections; but the general rule, in regard to what the application must ordinarily show, may be stated as follows: The books and papers or other documents should be specified or described with reasonable certainty under the circumstances of the case, and it should be shown that they are in the possession or control of the adverse party, and that they are material, or that their inspection is, in a legal sense, necessary to accomplish justice.<sup>35</sup>

**§ 1393. Application—Must show materiality.**—The fundamental requirement as to sufficiency of the motion or petition is that it must show upon good and sufficient cause that the books, papers or documents sought to be produced or inspected contain evidence material and pertinent to the issues and on behalf of the applicant.<sup>36</sup> It has been held that it is not sufficient that the application shows that it is made simply as a precautionary measure, but that the production of the books and papers sought is indispensably necessary.<sup>37</sup> Yet it has also been held that the applicant is not required to show that he would be unable to prove his case without the production or inspection of such books or documents.<sup>38</sup> But it is not sufficient to allege generally the materiality of the books or documents, as this would not only be

<sup>35</sup> *Fidelity & Casualty Co. v. Love*, 111 Fed. 772; *Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 76 Am. St. 176; *Whitman v. Weller*, 39 Ind. 15; *State v. District Court*, 27 Mont. 441, 71 Pac. 602; *Russell & Co. v. Swegan*, 79 N. Y. S. 440; *Woods v. De Figaniere*, 25 How. Pr. (N. Y.) 552; *Dickie v. Austin*, 65 How. Pr. (N. Y.) 420; *Lester v. People*, (150 Ill. 408), 41 Am. St. 375, and note; *Ely v. Mowry*, 12 R. I. 570.

<sup>36</sup> *Lester v. People*, 150 Ill. 408, 23 N. E. 387; *Bentley v. People*, 104 Ill. App. 353; *Bailey v. Williams Mfg. Co.* 9 N. Y. St. 518; *Davis v. Dunham*, 13 How. Pr. (N. Y.) 425; *Stanton v. Delaware, &c. Ins. Co.* 2 Sandf. (N. Y.) 662; *New England Iron Co. v. N. Y. Loan, &c. Co.* 55 How. Pr. (N. Y.) 351; *Babbitt v. Crampton*, 1 N. Y. Civ. Prac. 169; *Roche v. Day*, 20 Ill. App. 417;

*Mange v. Guenat*, 6 Whart. (Pa.) 141; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Dale v. Stokes*, 5 Redf. (N. Y.) 586; *Bryan v. Walton*, 14 Ga. 185; *Earnest v. Napier*, 15 Ga. 306; *First Nat'l Bank v. Mansfield*, 48 Ill. 494; *Meeth v. Rankin Brick Co.* 48 Ill. App. 602; *Wynn v. Taylor*, 109 Ill. App. 603; *Branson v. Fentress*, 13 Ired. (N. Car.) 165; *McGiboney v. Mills*, 13 Ired. (N. Car.) 163; *Justice v. Nat'l Bank*, 83 N. Car. 8; *McLeod v. Bullard*, 84 N. Car. 515; *Davenport v. Penn. R. Co.* 2 Penn. Dist. 784.

<sup>37</sup> *Campbell v. Hoge*, 2 Hun (N. Y.) 308; *Harrison v. Von Volkenburgh*, 5 Hun, 454; *Walmsley v. Nelson*, 3 Abb. New Cas. 127; *Woods v. De Figaniere*, 25 How. Pr. (N. Y.) 522.

<sup>38</sup> *Arnold v. Pawtuxet Valley, &c. Co.* 18 R. I. 189; *Peck v. Ashley*, 12 Metc. (Mass.) 478.

the averment of a conclusion, but would permit the question of materiality to be decided by the applicant instead of by the court. Hence it is not sufficient to allege that such books or papers contain evidence relative to the merits of the action, but it must be made to appear wherein such relation consists.<sup>39</sup> In other words, the rule, as stated by one court, is: "It is well settled that an order for discovery and inspection will never be granted unless the necessity therefor is clearly shown."<sup>40</sup> But it has been held that a showing is sufficient where it appears that the applicant is fairly entitled to the document asked for.<sup>41</sup>

**§ 1394. Showing materiality—Sufficiency.**—No absolute and unqualified rule can be laid down as to the sufficiency of the showing of materiality of the books or documents that will fit each particular case. As formerly shown, the granting of the order is within the sound discretion of the court, hence the rule which is flexible and sufficiently absolute is that the showing of materiality must be to the satisfaction of the court. This rule is more fully stated as follows: "To entitle a party to a discovery of the paper before trial the party applying must show to the satisfaction of the court that it is in writing; that some necessity exists for its inspection, and that its production is essential in the defense of the action."<sup>42</sup>

<sup>39</sup> *Gelston v. Marshall*, 6 How Pr. (N. Y.) 399; *Brevoort v. Warner*, 8 How. Pr. (N. Y.) 321; *Davis v. Dunham*, 13 How. Pr. (N. Y.) 425; *Wilkie v. Moore*, 17 How. Pr. (N. Y.) 481; *O'Connor v. Tack*, 2 Brewst. (Pa.) 407; *Morrison v. Sturgis*, 26 How. Pr. (N. Y.) 177; *Pegram v. Carson*, 10 Abb. Pr. (N. S.) 340; *Low v. Graydon*, 14 Abb. Pr. (N. S.) 443; *Hoyt v. American Ex. Bank*, 1 Duer (N. Y.) 652; *Cassard v. Hinman*, 6 Duer (N. Y.) 695; *Brooklyn, &c. Ins. Co. v. Pierce*, 7 Hun (N. Y.) 236; *Brownell v. National Bank*, 20 Hun (N. Y.) 517; *Walker v. Granite Bank*, 44 Barb. (N. Y.) 39; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Phelps v. Platt*, 54 Barb. (N. Y.) 557; *Dale v. Stokes*, 5 Redf. (N. Y.) 586; *Stanton v. Delaware, &c. Ins. Co.* 2 Sandf. (N. Y.) 662; *Holtz v.*

*Schmidt*, 34 N. Y. Super. Ct. 28; *Stichter v. Tillinghast*, 43 Hun (N. Y.) 95; *Jenkins v. Bennett*, 40 S. Car. 393; *Iasigi v. Brown*, 1 Curt. (N. S.) 401; *Eschbach v. Lightner*, 31 Md. 528; *Cummer v. Kent*, Ct. Judge, 38 Mich. 351; *Condict v. Wood*, 25 N. J. L. 319; *Bennett v. Reef*, 16 Colo. 431; *Hill v. Cawthon*, 15 Ark. 29.

<sup>40</sup> *Morrison v. Sturges*, 26 How. Pr. (N. Y.) 177; *Bien v. Hellman*, 2 Misc. (N. Y.) 168; *Hayden v. Van Cortlandt*, 84 Hun (N. Y.) 150.

<sup>41</sup> *Arnold v. Pawtuxet Valley, &c. Co.* 18 R. I. 189; *Wright v. Crane*, 13 S. & R. (Pa.) 447.

<sup>42</sup> *New England Iron Co. v. N. Y. Loan, &c. Co.* 55 How. Pr. (N. Y.) 351; *Bien v. Hellman*, 2 Misc. (N. Y.) 168; *Bailey v. Williams Mfg. Co.* 9 N. Y. St. 518; *Ely v. Mowry*, 12 R. I.



§ 1395. **Materiality—Presumption rule.**—While it is necessary that the materiality of the paper or document must be shown, it appears that the rule of indispensable necessity is entirely too stringent, and in many cases a rule much less strict and far more reasonable has been adopted. Such cases hold that the production and inspection of books and writings will be ordered where facts and circumstances are shown which warrant a presumption that the paper or document required to be produced contains evidence which will prove, or tend to prove, some fact necessary for the applicant to establish under the issues.<sup>43</sup>

§ 1396. **Application—Description of document.**—Another essential requirement of the motion or petition is that it shall definitely and sufficiently designate or describe the books, papers or documents required. A general reference is not sufficient; both the petition and the order should specify, with reasonable certainty, the book or paper which is to be produced. This rule must vary according to the circumstances of the particular cases; in some instances the demanding party may be able to describe the paper or document specifically and minutely, while in other cases it could only be given by general statements. "If a party can give so perfect a description of a document as that by mere inspection of the one produced it can be seen to be the one desired, he surely could not require an inspection. The description which the party is enabled to give must, of course, vary in its minuteness according to his means of knowledge and his memory. It is sufficient if the party gives the best description he is able, and that the court can see that such description is sufficient to enable the party who is called on to produce, to know what he is required to produce."<sup>44</sup>

570; *Case v. Banta*, 9 Bosw. (N. Y.)  
*Jacques v. Collins*, 1 Blatchf. (U. S.)  
23.

<sup>43</sup> *Davis v. Dunham*, 13 How. Pr. (N. Y.) 425; *Commercial Bank, &c. v. Dunham*, 13 How. Pr. (N. Y.) 541; *Hoyt v. American Exch. Bank*, 1 Duer (N. Y.) 652; *Lefferts v. Brampton*, 24 How. Pr. (N. Y.) 257; *Union Paper, &c. Co. v. Metropolitan, &c. Co.* 3 Daly (N. Y.) 171; *Ahlmeier v. Healy*, 14 Daly, 288; *Lord v. Spielman*, 13 Misc. (N. Y.) 48; *Thompson v. Erie R. Co.* 9 Abb. Pr. (N. S.) 212; *Isaigi v. Brown*, 1

*Curt. (U. S.)* 401; *Wright v. Crane*, 13 S. & R. (Pa.) 447; *Ruberry v. Binns*, 5 Bosw. (N. Y.) 685; *Low v. Graydon*, 14 Abb. Pr. (N. S.) 443.

<sup>44</sup> *Jacques v. Collins*, 1 Blatchf. (U. S.) 23; *Low v. Graydon*, 14 Abb. Pr. (N. S.) 443; *People v. Trinity Church*, 6 Abb. Pr. (N. S.) 177; *Watson v. Renwick*, 4 Johns. Ch. (N. Y.) 381; *Jackling v. Edmonds*, 3 E. D. Smith (N. Y.) 539; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Merguelle v. Continental, &c. Co.* 7 Robt. (N. Y.) 76; *Dale v. Stokes*, 5 Redf. (N. Y.) 586; *Cassard v. Hinman*, 6 Duer (N. Y.)

And if particular parts, or certain entries in a particular book are required to be produced, such parts and entries must be particularly described.<sup>45</sup>

§ 1397. **Application—Possession.**—In addition to the materiality of the book or document, it is necessary that the application show that the books, papers or documents sought to be produced are in the possession or control of the adverse party; the order of the court can only operate upon the parties, and hence the necessity of this rule. The rule does not require that the showing as to possession must be absolute, but it has been held to be sufficient where it requires the adverse party to produce the documents or deny such possession. The rule as stated by one court is: "Nor is it necessary, in such an application, for the party to swear that the books, etc., are not in his possession, or under his control. It is enough for him to show what the statute requires, that they are in the possession, or under the control, of the adverse party; and in this respect, it is sufficient if he shows a state of facts which satisfies the court or officer that the party, against whom the application is made, has the ability to comply with the order for a discovery."<sup>46</sup> But if the statute requires the applicant to state under

695; *New England, &c. Co. v. New York, &c. Co.* 55 How. Pr. (N. Y.) 351; *Whitman v. Weller*, 35 Ind. 515; *Wills v. Kane*, 2 Grant (Pa.) 47; *Commissioners v. Lemly*, 85 N. Car. 341; *Davenport v. Pennsylvania R. Co.* 2 Pa. Dist. 784; *Rose v. King*, 5 S. & R. (Pa.) 241; *Dickie v. Austin*, 4 N. Y. Civ. Prac. 123; *Cowles v. Cowles*, 2 P. & W. (Pa.) 139; *Cornish v. Wormser*, 53 Hun (N. Y.) 40; *Dyett v. Seymour*, 3 N. Y. Supp. 643; *Julius King Op. Co. v. Treat*, 72 Mich. 599; *Wright v. Crane*, 13 S. & R. (Pa.) 450; *Condict v. Wood*, 25 N. J. L. 319; *Parish v. Weed, &c. Co.* 79 Ga. 682; *Georgia Iron Co. v. Etowah Iron Co.* 104 Ga. 395; *Cornish v. Wormser*, 17 N. Y. Civ. Proc. 282.

<sup>45</sup> *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 132; *New England, &c. Co. v. N. Y. Loan, &c. Co.* 55 How. Pr. 351; *Kaupe v. Isdell*, 3 Rob. (N. Y.)

699; *Lynch v. Henderson*, 10 Abb. Pr. (N. S.) 345; *Ashley v. Whitney*, 54 N. Y. Sup. Ct. 540. See, also, as to particularity of description required. *Whitman v. Weller*, 39 Ind. 515.

<sup>46</sup> *Exchange Bank v. Monteath*, 4 How. Pr. (N. Y.) 280; *Case v. Banta*, 9 Bosw. (N. Y.) 595; *National Oleo, &c. Co. v. Jackson*, 54 N. Y. Super. 444; *Iasigi v. Brown*, 1 Curt (U. S.) 401; *Bryan v. Walton*, 14 Ga. 185; *Earnest v. Napier*, 15 Ga. 306; *Boorman v. Atlantic, &c. R. Co.* 78 N. Y. 599; *Wright v. Crane*, 13 S. & R. (Pa.) 447; *Whitman v. Weller*, 35 Ind. 515; *Wills v. Kane*, 2 Grant (Pa.) 47; *Beebe v. Equitable, &c. Asso.* 76 Iowa, 129; *Carlton v. Western, &c. R. Co.* 81 Ga. 531; *Smithson v. Stanton*, 7 D. C. 6; *Hoyt v. American Exch. Bank*, 1 Duer (N. Y.) 652; *Woods v. De Figanieri*, 25 How. Pr. (N. Y.) 523;

oath that the paper or document desired is not in his possession or under his control, then this requirement must be complied with.<sup>47</sup>

§ 1398. **Application—Necessity.**—Another essential of the petition or motion is that it must show a necessity for the production of the desired document as distinct from its materiality. This is not intended to mean or to be construed that a party will not be entitled to the production without showing an indispensable necessity; but it means rather that such a statement should be made that will show a reasonable necessity for requiring the production. In an early case the rule was stated in even stronger terms, to the effect that “the discovery is generally granted upon the principle that the party cannot prove the facts sought to be discovered without resorting to the conscience of the opposite party; and this is of the essence of the right.”<sup>48</sup> In the opinion in a later case by the same court it is said: “We do not wish to be understood as saying that the suitor at law cannot have a discovery in aid of his suit or defense, in any case where, though he may have some evidence, the proof of the claim or defense relied upon would be doubtful or difficult without the aid of the discovery, in respect of which there may be debatable ground in theory as well as practice.”<sup>49</sup> In New York a distinction seems to have been made in cases at law and where relief is sought in chancery.<sup>50</sup> But the cases generally are agreed that some showing of necessity must be made.<sup>51</sup>

Ahoyke v. Wolcott, 4 Abb. Pr. (N. S.) 41; Bradstreet v. Bailey, 4 Abb. Pr. (N. S.) 233; McIlhanney v. Magie, 13 N. Y. Civ. Proc. 16; Holly Mfg. Co. v. Benner, 86 Hun (N. Y.) 42; Bas v. Steele, 3 Wash. (U. S.) 381; Douglas v. Delano, 20 N. Y. Wkly. Dig. 85; Smithson v. Stanton, 7 Dist. C. 6; Lester v. People, 150 Ill. 408, 41 Am. St. 375, and notes, p. 388.

<sup>47</sup> Jackling v. Edmonds, 3 E. D. Smith (N. Y.) 539; Schuetze v. Continental L. Ins. Co. 69 Wis. 252.

<sup>48</sup> Field v. Pope, 5 Ark. 66.

<sup>49</sup> Hill v. Cawthon, 15 Ark. 29.

<sup>50</sup> Marsh v. Davidson, 9 Paige (N. Y.) 584.

<sup>51</sup> Hamby Mines v. Findley, 85 Ga. 431; Meeth v. Rankin Brick Co. 48 Ill. App. 602; Cummer v. Kent Judge, 38 Mich. 351; Pegram

v. Carson, 10 Abb. Pr. (N. Y.) 340; Cutter v. Pool, 3 Abb. N. Cas. (N. Y.) 130; Husson v. Fox, 15 Abb. Pr. (N. S.) 464; Strong v. Strong, 1 Abb. Pr. (N. S.) (N. Y.) 233; Hauseman v. Sterling, 61 Barb. (N. Y.) 347; Mara v. McCredy, 2 Bosw. (N. Y.) 669; Gelston v. Marshall, 6 How. Pr. (N. Y.) 398; Commercial Bank v. Dunham, 13 How. Pr. (N. Y.) 541; Wilkie v. Moore, 17 How. Pr. (N. Y.) 480; McAllister v. Pond, 15 How. Pr. (N. Y.) 299, 6 Duer (N. Y.) 702; Morrison v. Sturges, 26 How. Pr. (N. Y.) 177; New England Iron Co. v. N. Y. Loan, &c. Co. 55 How. Pr. (N. Y.) 351; Campbell v. Hoge, 2 Hun (N. Y.) 308; Hayden v. Van Cortlandt, 84 Hun (N. Y.) 150; Bien v. Hellman, 2 Misc. (N. Y.) 168; Mason v. Smith, 18 N. Y. St. 10;

§ 1399. **Production—Framing pleadings.**—The rules in most jurisdictions in regard to the production of documents are sufficiently liberal to grant this right to a party on petition or application to aid him in preparing or drawing his complaint. For this purpose the petition should show that the production or inspection desired is necessary to enable the applicant to draw his pleading. It is not necessary that the allegations of the pleading be made upon actual knowledge; it will be sufficient if they are based upon information and belief.<sup>52</sup> And production will be ordered for the purpose of aiding a defendant in framing his answer.<sup>53</sup> And it has been held that the production of papers and documents will be ordered for the purpose of enabling a party to frame a bill of particulars.<sup>54</sup>

*Smith v. Seattle, &c. R. Co.* 41 N. Y. St. 672; *Holtz v. Schmidt*, 34 N. Y. Super. Ct. 28; *Bloom v. Patten*, 58 N. Y. Super. Ct. 225; *Kaupe v. Isdell*, 3 Rob. (N. Y.) 699; *Merguelle v. Continental, &c. Co.* 7 Rob. (N. Y.) 77; *Stanton v. Delaware, &c. Ins. Co.* 2 Sandf. (N. Y.) 662; *Moore v. McIntosh*, 18 Wend. (N. Y.) 529; *Noonan v. Orton*, 28 Wis. 600; *Williams, &c. Co. v. Raynor*, 38 Wis. 132; *Kraus v. Sentinel Co.* 62 Wis. 660.

<sup>52</sup> *Wallis v. Murray*, 4 Cow. (N. Y.) 399; *Stilwell v. Priest*, 85 N. Y. 649; *Manley v. Bennel*, 11 Abb. N. Cas. (N. Y.) 123; *Vieller v. Oppenheim*, 31 Abb. N. Cas. (N. Y.) 181; *Ruberry v. Binns*, 5 Bosw. (N. Y.) 685; *Livingston v. Curtis*, 54 How. Pr. (N. Y.) 370, 12 Hun (N. Y.) 121; *Perrow v. Lindsay*, 52 Hun (N. Y.) 115; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21; *Rafferty v. Williams*, 50 N. Y. Super Ct. 66; *Niehesy v. Kahn*, 50 N. Y. Super. Ct. 209; *Hofman v. Seixas*, 12 Misc. (N. Y.) 3; *McIlhanney v. Magie*, 12 N. Y. Civ. Proc. 27; *Justice v. National Bank*, 83 N. Car. 8; *Newman v. Newman*, 20 N. Y. Wkly. Dig. 283; *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Denslow v. Fowler*, 2 Cow. (N. Y.) 592; *Clarke v. Spencer*, 6 Cow. (N. Y.) 59; *Bank,*

*&c. v. Hillend*, 6 Cow. (N. Y.) 62; *Terry v. Rubel*, 12 N. Y. Leg. Obs. 138; *Roche v. Farran*, 12 N. Y. Leg. Obs. 121; *Douglas v. Delano*, 20 N. Y. Wkly. Dig. 85; *Thorpe v. Macaulay*, 5 Madd. 227; *Marsden v. Panshall*, 1 Vern. 407; *Heathcote v. Fleet*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Rondeau v. Whyatt*, 3 Brown C. C. 154; *Mayor, &c. of London, v. Levy*, 8 Ves. 404.

<sup>53</sup> *Stanton v. Delaware, &c. Ins. Co.* 2 Sandf. (N. Y.) 662; *Union Paper, &c. Co. v. Metropolitan, &c. Co.* 3 Daly (N. Y.) 171; *Inyo, &c. Mining Co. v. Pheby*, 49 N. Y. Super. 392; *Wesson v. Judd*, 1 Abb. Pr. (N. S.) 254; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Stebbins v. Harmon*, 17 Hun (N. Y.) 445; *Brevoort v. Warner*, 8 How. Pr. (N. Y.) 321; *Frowein v. Lindheim*, 25 Abb. N. Cas. 87; *Wallis v. Bailey*, 19 Johns. (N. Y.) 268; *Lawrence v. Ocean Ins. Co.* 11 Johns. (N. Y.) 241; *Germania, &c. Ins. Co. v. Circuit Judge*, 41 Mich. 258; *Eddy v. Circuit Judge*, 114 Mich. 668; *Anti-Kalsomine Co. v. Circuit Judge*, 120 Mich. 250; *Kraus v. Sentinel Co.* 62 Wis. 660; *Princess of Wales v. Earl of Liverpool*, 11 Wils. 29.

<sup>54</sup> *Ball v. Evening Post, &c. Co.* 12 N. Y. Civ. Proc. 4; *Cornish v. Wormser*, 17 Civ. Proc. (N. Y.) 282.

**§ 1400. Production—Preparation for trial.**—The party is also entitled to require the production of books, papers and documents, upon a proper application and showing to enable him to prepare for a trial of the cause. The motion or application is based upon the claim that the production of the desired documents will prove or tend to prove the applicant's case under the issues, and it should show that such discovery is sought by the applicant to aid him in proving his cause of action or his defense, and he is entitled to a discovery as to such matters of fact as are material to the prosecution or defense of his entire cause. Such application should contain all the other essentials required in such a motion or petition, and is addressed to the discretion of the court.<sup>55</sup>

<sup>55</sup> *Kirkpatrick v. Pope Mfg. Co.* 61 Fed. 46; *Downie v. Nettleton*, 61 Conn. 593; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23; *Douglas v. Delano*, 20 N. Y. Wkly. Dig. 85; *Lester v. People*, 150 Ill. 408; *Bentley v. People*, 104 Ill. App. 353; *Swedish-Am. Tel. Co. v. Fidelity, &c. Co.* 208 Ill. 562; *Seligman v. Real Estate, &c. Co.* 20 Abb. N. Cas. 210; *Tedens v. Sanitary Dist. &c.* 149 Ill. 87; *Wertheim v. Continental &c. Co.* 15 Fed. 716, and notes; *Rigdon v. Conley*, 141 Ill. 565; 31 Ill. App. 630; *Pynchon v. Day*, 118 Ill. 9; *State v. Allen*, 5 Kans. 213; *Peck v. Ashley*, 12 Met. (Mass.) 478; *Post, &c. Co. v. Toledo, &c. Co.* 144 Mass. 341; *Stichter v. Tillinghast*, 43 Hun (N. Y.) 95; *Hart v. Ogdensburg, &c. R. Co.* 69 Hun (N. Y.) 497; *Rutter v. Germicide Co.* 70 Hun (N. Y.) 403; *Holly Mfg. Co. v. Vanner*, 86 Hun (N. Y.) 42; *Powers v. Elmendorf*, 4 How. Pr. (N. Y.) 60; *Mott v. Consumers' Ice Co.* 52 How. 148; *Lefferts v. Brampton*, 24 How. Pr. (N. Y.) 257; *Amsinck v. North*, 62 How. Pr. (N. Y.) 114; 12 (N. Y.) Wkly. Dig. 573; *Douglas v. Delano*, 20 N. Y. Wkly. Dig. 85; *Andrews v. Townshend*, 2 N. Y. Civ. Proc. 76; *Babbitt v. Crampton*, 1 N. Y. Civ. Proc. 169,

and notes; *Board, &c. v. King*, 7 N. Y. Civ. Proc. 64; *Shoe & Leather, &c. Asso. v. Bailey*, 17 N. Y. Civ. Proc. 385; *Bundschu v. Simon*, 23 N. Y. Civ. Proc. 80, 23 N. Y. Supp. 714; *Boyce v. Super*, 35 W. N. C. 339; *Duff v. Hutchinson*, 19 N. Y. Wkly. Dig. 20; *Terry v. Rubel*, 12 N. Y. Leg. Obs. 138; *Townsend v. Lawrence*, 9 Wend. (N. Y.) 458; *Watson v. Renwick*, 4 Johns. Ch. (N. Y.) 381; *March v. Davidson*, 9 Paige (N. Y.) 580; *Roosevelt v. Ellithorpe*, 10 Paige (N. Y.) 417; *Lord v. Spielman*, 13 Misc. (N. Y.) 48; *Vieller v. Oppenheim*, 31 Abb. N. Cas. 181, and notes; *Union Paper, &c. Co. v. Metropolitan, &c. Co.* 3 Daly (N. Y.) 171; *Ahlmeier v. Healy*, 12 N. Y. St. 677; *Smith v. Seattle, &c. R. Co.* 41 N. Y. St. 672, 16 N. Y. Supp. 417; *Mason v. Smith*, 2 N. Y. Supp. 355; *Niewry v. O'Hara*, 1 Barb. (N. Y.) 484; *Elsworth v. Hinton*, 23 Abb. N. Cas. 374; *Branson v. Fentress*, 13 Ired. (N. Car.) 161; *Justice v. Bank*, 83 N. Car. 8; *McLeod v. Bullard*, 84 N. Car. 515; *Commissioners v. Lemly*, 85 N. Car. 341; *Austin v. Secrest*, 91 N. Car. 214; *Arnold v. Pawtuxet, &c. Co.* 18 R. I. 189; *Phelps v. Atlantic, &c. Tel. Co.* 46 Wis. 266.

The rule as to the sufficiency of such application is "that such showing ought to be by affidavit particularly pointing out the necessity and propriety of the desired order, so the court can see that the applicant really needs it to enable him to fairly present his cause of action or his defense, and that the application is for no improper or ulterior purpose."<sup>56</sup>

The fact that the papers, books or documents could be produced on the trial by a subpoena duces tecum is not a sufficient answer to an application for the production for inspection, as this would not aid a party in preparing his case for trial.<sup>57</sup>

§ 1401. **Documents — Books.**—In deciding the question as to whether or not the production of a writing, instrument or object can be compelled by order of court, it must first be determined whether such instrument or writing falls within the definition of the term "document." It is unnecessary to repeat here the various definitions of this term as laid down in a previous section,<sup>58</sup> but it is sufficient to say that "a document is an instrument on which is recorded, by means of letters, figures or marks, matter which may be evidentially used. In this sense the term document applies to writings, to words printed, lithographed or photographed, to seals, plates or stones, on which inscriptions are cut or engraved, to photographs and pictures, to maps and plans." And in reference to their use as evidence it is said that "so far as concerns admissibility it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stone, or gems, or wood, as well as on paper or parchment."<sup>59</sup> Under these definitions of the term it has been held that a

See *Paine v. Warren*, 33 Fed. 357; *Frank v. Frank*, 1 Houst. (Del.) 245; *Herbert v. Dean, &c.* Westminster, 1 P. Wms. 773; *Bettison v. Farrington*, 3 P. Wms. 363; *Gardiner v. Mason*, 4 Brown C. C. 479; *Shaftsbury v. Arrowsmith*, 4 Ves. 66; *Evans v. Richard*, 1 Swanst. 7; *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114; *Goldschmidt v. Marryat*, 1 Camp. 559; *Hill v. Greatwestern, &c. R. Co.* 10 C. B. N. S. 148; *Taylor v. Milner*, 11 Ves. 42; *Clifford v. Taylor*, 1 Taunt. 167.

<sup>56</sup> *Meeth v. Rankin Brick Co.* 48 Ill. App. 602.

<sup>57</sup> *Lord v. Spielman*, 13 Misc. (N. Y.) 48; *Lefferts v. Brampton*, 24 How. Pr. (N. Y.) 257; *Low v. Graydon*, 14 Abb. Pr. (N. S.) 443; *Babbitt v. Crampton*, 1 N. Y. Civ. Proc. 169; *Phelps v. Atlantic, &c. Tel. Co.* 46 Wis. 266.

<sup>58</sup> See ante § 1255.

<sup>59</sup> *Johnson St. R. Co. v. North Branch Steel Co.* 48 Fed. 191; *Arnold v. Pawtuxet Valley Water Co.* 18 R. I. 189; *Merrick v. Wakley*, 8 A. & E. 170.

book is a document within the meaning of the term and within the statute using the word document.<sup>60</sup>

§ 1402. **Documents—Miscellaneous.**—The adjudicated cases cover a wide range of instruments and writings which come within the statutes and under the rules of equity practice. These holdings include bonds,<sup>61</sup> a bond and the mortgage securing the same with permission to take photograph copies of the signature,<sup>62</sup> and checks in connection with books and papers of the trustee.<sup>63</sup>

Where production of a contract sued upon was demanded it was held that the bare denial of its possession without further explanation was not sufficient. It is not sufficient to allow the court to deny the application.<sup>64</sup> And such order will be granted where the contract was executed in duplicate.<sup>65</sup> Deeds relied upon as a defense in ejectment proceedings have been ordered to be produced and deposited with the clerk.<sup>66</sup> The rule has been extended to letters;<sup>67</sup> and to telegraphic messages;<sup>68</sup> vouchers of an agent in connection with his book of accounts.<sup>69</sup>

<sup>60</sup> *Nichols v. McGeoch*, 78 Wis. 360; *Arnold v. Pawtuxet Valley Water Co.* 18 R. I. 189; *Shephard*, In re, 3 Fed. 12; *Manley v. Bonnell*, 11 Abb. N. Cas. (N. Y.) 123; *Duff v. Hutchinson*, 19 N. Y. Wkly. Dig. 20; *Elsworth v. Hinton*, 23 Abb. N. Cas. (N. Y.) 374; *Fowler's Petition*, 9 Abb. N. Cas. (N. Y.) 268; *Harding v. Field*, 18 N. Y. Supp. 918; *Babbitt v. Crampton*, 1 Civ. Proc. (N. Y.) 169, and notes; *Higgins v. Bishop*, 12 Leg. Obs. (N. Y.) 127; *Petrie v. Dickerman*, 90 Mich. 265; *Commissioners v. Lemly*, 85 N. Car. 341; *Burden v. Burden*, 23 Wkly. Dig. (N. Y.) 289. Many of these cases include accounts and books of account.

<sup>61</sup> *McGibboney v. Mills*, 35 N. Car. (13 Ired.) 163; *Commissioners v. Lemley*, 85 N. Car. 341.

<sup>62</sup> *Holmes v. Cornell*, 7 Wk. Dig. N. Y. 375.

<sup>63</sup> *Elsworth v. Hinton*, 23 Abb. N. Car. (N. Y.) 374.

<sup>64</sup> *Hepburn v. Archer*, 27 N. Y. Supr. 535.

<sup>65</sup> *Smith v. Seattle, &c. R. Co.* 41 N. Y. St. 672; *Fowler's Petition*, 9 Abb. N. Car. (N. Y.) 268.

<sup>66</sup> *Jackson v. Jones*, 3 Cow. (N. Y.) 17.

<sup>67</sup> *Livermore v. St. John*, 4 Rob. (N. Y.) 12; *Harding v. Field*, 18 N. Y. S. 918; *Travers v. Satterlee*, 22 N. Y. S. 118; *Marion Nat'l Bank v. Abell's Adm'r*, 88 Ky. 428.

<sup>68</sup> *Woods v. Miller*, 55 Iowa, 168, 39 Am. 170; *Ex parte Brown*, 72 Mo. 83; *State v. Litchfield*, 58 Me. 267; *United States v. Babcock*, 3 Dillon (U. S.) C. C. 566; *United States v. Hunter*, 15 Fed. 712; *Ince's Case*, 20 L. T. (N. S.) 421; *Phelps v. Atlantic, &c. Tel. Co.* 46 Wis. 266; *National Bank v. National Bank*, 7 Va. 544.

<sup>69</sup> *Manley v. Bonnell*, 11 Abb. N. Cas. 123.

§ 1403. **Production—Partnership books.**—The rule requiring the production of books and papers is especially applicable to such instruments and documents of a partnership. The partnership books are the property of the firm, and each member is equally entitled to their possession and to an examination and inspection thereof for any action he might wish to institute. In all such cases it is the uniform practice of courts at any stage of the action and upon the application of either party, to order the adverse party to produce or deposit any of the partnership books and papers belonging equally to both with some designated person or officer of the court, for the examination and inspection of the party making the application, and permitting copies to be taken by any of the partners. "In a court of law, it is a matter of course, to compel one party, who has the possession of a document which belongs equally to both, to produce the same for the inspection of his adversary, for the purpose of the suit."<sup>70</sup> The general rule is that in actions against an individual member of a partnership, the production of the firm books, papers and documents will not be ordered.<sup>71</sup> But it has been held that in certain cases under peculiar circumstances in an action against an individual member of a firm the production of the partnership books would be required.<sup>72</sup>

§ 1404. **Inspection of articles and property other than documents.** As already shown, the courts have in some cases ordered compulsory discovery of some things that are not strictly documents in the popular sense of the term;<sup>73</sup> and it has been held proper to allow a party to take photographs of documents in the possession of the other party.<sup>74</sup> But orders for the inspections of buildings have been refused by the English courts in several instances.<sup>75</sup> So in a recent case in

<sup>70</sup> Kelly v. Eckford, 5 Paige Ch. (N. Y.) 548; Stebbins v. Harmon, 24 N. Y. Supr. Ct. 445; Rigdon v. Conley, 141 Ill. 565; Bearns v. Buras, 86 Hun (N. Y.) 258; Micklethwait v. Moore, 3 Meriv. 296; Pickering v. Rigby, 18 Ves. 484; Reed v. Coleman, 2 Crompt. & M. 456.

<sup>71</sup> Reid v. Langlois, 1 Mac N. & G. 627; Taylor v. Randall, Craig & P. 104; Murray v. Walter, Craig & P. 144; Lopez v. Deacon, 6 Bev. 254; Martine v. Albro, 26 Hun (N. Y.) 559.

<sup>72</sup> Martine v. Albro, 26 Hun (N. Y.) 559.

<sup>73</sup> See, also, Lumb v. Beaumont, 27 Ch. Div. 356; Morris v. Howell, L. R. 22 Ir. 77; Henzey v. Mining Co. 80 Fed. 178 (leave granted to examine a mine).

<sup>74</sup> Krooks v. L. & C. Wire Co. (1893) 2 Q. B. 191.

<sup>75</sup> Newham v. Tate, 1 Arnold, 244; 6 Scott, 574; Turquand v. Strand Union, 8 Dowl. Pr. 201.



New York it was held that a rule of practice authorizing a party to compel his adversary to make discovery not only of documents, but also of any article in his possession or under his control was inconsistent with the statute authorizing the discovery of documents and papers, and was not authorized by another section of the code which provided that the general rules of practice should prescribe the cases in which a discovery or inspection might be compelled and the proceedings for that purpose, where the same were not prescribed by the code; and an order for discovery and examination of property which was alleged to have been defective, and to have thus caused the personal injury complained of, was held erroneous.<sup>76</sup>

**§ 1405. Production—Public documents.**—The rule seems to be well established that courts have no power, or, if they have, that they will not, ordinarily, exercise the power, to order or compel the production of public documents. There seem to be the very best reasons for this. The first and perhaps the fundamental reason is that public records are open within proper hours for the inspection of the public; consequently neither party can conceal from the other the contents of such a record, and it is equally open to both parties. Again, such records are not under the control of either party to an action. By statute, or the rules of the common law, copies of such records are admissible in evidence and can be secured by a party,—either an examined copy or a duly certified copy.<sup>77</sup>

But it was held in one case that where public records, orders for the assignment of a bond, were in different courts and in various clerks' offices, the production of the assignment would be compelled.<sup>78</sup>

**§ 1406. Inspection—Public documents.**—As shown in the preceding section, the production of public documents at the trial cannot ordinarily be had, because it would be detrimental to the public interest and against public policy to permit them to be taken from the place of lawful custody, and also because the public have the right

<sup>76</sup> *Auerbach v. Delaware, &c. R. Co.* 66 App. Div. 201, 73 N. Y. S. 118. See, also, *Downey v. McAleenan*, 16 N. Y. S. 916; *Cooke v. Lalance, &c. Mfg. Co.* 29 Hun (N. Y.) 641; *Ansere v. Tuska*, 199 Abb. Pr. (N. S.) 391.

<sup>77</sup> *Speelman v. Flynn*, 19 Neb. 342; *Hammerslough v. Hackett*, 30 Kans. 57; *Delaney v. Regulators*, 1

*Yeates*, 403; *Shippen v. Wells*, 2 *Yeates*, 260; *Corbett v. Gibson*, 16 *Blatchf.* 334; *Reg. v. Russell*, 7 *Dowl.* 693; *Gray v. Pentland*, 2 S. & R. 23. See *Meakings v. Cromwell*, 1 *Sandf.* (N. Y.) 698; 2 *Phillips Ev.* 304-336.

<sup>78</sup> *Lovell v. Clarke*, 7 *How. Pr.* (N. Y.) 158.

ordinarily to inspect them under proper rules and regulations<sup>79</sup> at such place. It was long ago admitted that the inspection or exemplification of the records of the King's courts is a common right of the subject.<sup>80</sup> It has been said that any limitation of the right to a copy of a judicial record or paper when applied for by any person having an interest in it would be repugnant to the genius of American institutions.<sup>81</sup> So it was long ago held that where writs and other papers in a cause were held officially in the custody of an officer of the court, such, for instance, as the Marshall of the King's Bench prison, he might be compelled by rule of court to permit an inspection of them, even though it would furnish evidence in a civil action against himself.<sup>82</sup>

It is said, however, by Mr. Greenleaf, that in regard to records of inferior tribunals the right of inspection is more limited. "As all persons have not necessarily an interest in them, it is not necessary that they should be open to the inspection of all, without distinction. The party, therefore, who wishes to inspect the proceedings of any of those courts, should first apply to that court, showing that he has some interest in the document, and that he requires it for a proper purpose.<sup>83</sup> If it should be refused, the court of chancery, upon affidavit of the fact, may at any time send, by a writ of certiorari, either for the record itself or an exemplification. The King's Bench in England, and the Supreme Courts of common law in America, have the same power by mandamus;<sup>84</sup> and this whether an action be pending or not."<sup>85</sup>

§ 1407. **Inspection — Quasi-public documents.**—As said by Mr. Greenleaf, there are records which partake both of a public and pri-

<sup>79</sup> See, as to the right being subject to regulations *Buck v. Collins*, 51 Ga. 395; *Bean v. People*, 7 Colo. 201, 2 Pac. 909.

<sup>80</sup> Greenleaf Evidence, § 471.

<sup>81</sup> *Stone v. Crocker*, 24 Pick. (Mass.) 88. By statute, or judicial decision the right to inspect public records is recognized in nearly every state.

<sup>82</sup> *Fox v. Jones*, 7 B. & C. 732.

<sup>83</sup> If he has no legal interest in the record, the court may refuse the application. *Powell v. Bradbury*, 4 C. B. 541.

<sup>84</sup> *Gresley Ev.* pp. 115, 116; *Wilson v. Rogers*, 2 Str. 1242; *Rex v. Smith*, 1 Str. 126; *Rex v. Tower*, 4 M. & S. 162; *Herbert v. Ashburner*, 1 Wils. 297; *Rex v. Allgood*, 7 T. R. 742; *Rex v. Sheriff of Chester*, 1 Chitty, 479.

<sup>85</sup> *Rex v. Lucas*, 10 East, 235, 236, per *Ld. Ellenborough*. See, also, *State v. King*, 154 Ind. 621, 57 N. E. 535; *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418, and authorities there reviewed.

vate character, and are treated as the one or the other, according to the relation in which the applicant stands to them. Thus, the books of a corporation are, in a sense, public with respect to its members, but generally private with respect to strangers.<sup>86</sup> It is well settled, as a general rule, that stockholders have a right to inspect the corporate books, and this right is often enforced by mandamus, and it is said that a rule of inspection of the writings of the corporation will be granted, of course, on their application, where such inspection is shown to be necessary in regard to some particular matter in dispute, or where the granting of it is necessary to prevent the applicant from suffering injury or to enable him to perform his duties; and the inspection will then be granted only so far as is shown to be essential to that end.<sup>87</sup> But a stranger, ordinarily, has no right to such rule, and it has been held that it will not be granted, even where he is defendant in a suit brought by the corporation.<sup>88</sup> It has been held, however, that a plaintiff in an action against a municipal corporation has the right to inspect such public records and documents in the possession of the defendant as are pertinent and material to the trial of the issue, and that where he is refused that right he may apply by motion, designating the particular records and documents, for a rule on the official or agent of the defendant having custody of the same to show cause why the inspection of the same should not be allowed.<sup>89</sup> But it is held in the same case that a peremptory order requiring the defendant in its corporate capacity to exhibit certain records and documents for the inspection of the defendant at certain times and places was improperly granted.

In the class of records first referred to in this section, Mr. Greenleaf enumerates parish books,<sup>90</sup> transfer books of the East India Com-

<sup>86</sup> *Gresley Ev.* 116.

<sup>87</sup> *Rex v. Merchant Tailors' Co.* 2 B. & Ad. 115; *State v. City Bank, &c.* 1 Rob. (La.) 470; *People v. Throop*, 12 Wend. (N. Y.) 183.

<sup>88</sup> *Mayor, &c. v. Graves*, 8 T. R. 590. The party, in such case, can give notice to the corporation to produce its books and papers, as in other cases between private persons. See, accordingly, *Burrell v. Nicholson*, 3 B. & Ad. 649; *Bank, &c. v. Hilliard*, 5 Cowen (N. Y.) 419, 6 Cowen, 62; *Imperial Gas Co.*

*v. Clarks*, 7 Bing. N. Cas. 95; *Rex v. Justices, &c.* 8 B. & C. 375.

<sup>89</sup> *Dist. of Columbia v. Baker-smith*, 18 App. D. C. 574. So, mandamus will generally lie, and the law is not so strict in regard to the interest of the relater as it was. See *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418, and authorities cited.

<sup>90</sup> *Cox v. Copping*, 5 Mod. 396; *Newell v. Simpkin*, 6 Bing. N. Cas. 565; *Jacocks v. Gilliam*, 3 Murph. (N. Car.) 47.

pany,<sup>91</sup> public lottery books,<sup>92</sup> the books of incorporated banking companies,<sup>93</sup> and a bishop's registry of presentations.<sup>94</sup> "If an inspection is wanted by a stranger, in a case not within this rule of the common law," he says, "it can only be obtained by a bill of discovery; a court of equity permitting a discovery in some cases and under some circumstances, where courts of law will not grant an inspection."<sup>95</sup>

Inspection of the books of public officers is subject, ordinarily, to the same restriction as in the case of corporation books; and access to them, it is said, "will not be granted in favor of persons who have no interest in the books. Thus, an inspection of the books of the post-office has been refused, upon the application of the plaintiff, in a *qui tam* action against a clerk in the post-office, for interfering in the election of a member of Parliament, because the action did not relate to any transaction in the post-office, for which alone the books were kept."<sup>96</sup> Upon the same ground, that the subject of the action was collateral to the subject matter and design of the books, an inspection of the books of the custom house has been refused.<sup>97</sup> Such inspections are also sometimes refused on grounds of public policy, the disclosure sought being considered detrimental to the public interest. But in all cases of public writings, if the disclosure of their contents would, either in the judgment of the court or of the chief executive magistrate, or the head of department in whose custody or under whose control they may be kept, be injurious to the public interests, an inspection will not be granted.<sup>98</sup> The motion for a rule to inspect and take copies of books and writings when an action is pending, may be made at any stage of the cause, and is founded on an affidavit stating the circumstances under which the inspection is claimed, and that an application therefor has

<sup>91</sup> *Geery v. Hopkins*, 2 *Ld. Ray.* 851, 7 *Mod.* 129; *Shelling v. Farmer*, 1 *Str.* 646.

<sup>92</sup> *Schinotti v. Bumstead*, 1 *Tidd Pr.* 594.

<sup>93</sup> *Brace v. Ormond*, 1 *Meriv.* 409; *People v. Throop*, 12 *Wend. (N. Y.)* 183; *Union Bank v. Knapp*, 3 *Pick. (Mass.)* 96; *Mortimer v. M'Callan*, 6 *M. & W.* 68; *McKavlin v. Bresslin*, 8 *Gray (Mass.)* 177.

<sup>94</sup> *Rex v. Bishop of Ely*, 8 *B. & C.* 112; *Finch v. Bishop of Ely*, 2 *M. & Ry.* 127.

<sup>95</sup> 1 *Greenleaf Ev.* § 474; *Gresley Ev.* 116, 117.

<sup>96</sup> *Crew v. Blackburn*, cited 1 *Wils.* 240; *Crew v. Saunders*, 2 *Str.* 1005.

<sup>97</sup> *Atherfold v. Beard*, 2 *T. R.* 610.

<sup>98</sup> 1 *Greenleaf Ev.* §§ 250, 251.

been made to the proper quarter and refused.<sup>99</sup> But when no action is pending, the proper course is to move for a rule to show cause why a mandamus should not issue commanding the officer having custody of the books to permit the applicant to inspect them and take copies. The application in this case should state some specific object sought by the inspection and be supported by an affidavit, as in the case preceding. If a rule is made to show cause why an information in the nature of a quo warranto should not be filed, a rule for an inspection will be granted to the prosecutor immediately upon the granting of a rule to show cause. But if a rule be made to show cause why a mandamus should not be awarded, the rule for an inspection will not be granted until the mandamus has been issued and returned.<sup>100</sup>

**§ 1408. Failure to produce — Excuse.**—Where a party against whom the production of papers or documents is sought is unable to comply with the application or order, he may avail himself of such impossibility by way of answer. If an absolute rule is entered he may make his answer in discharge of the rule; or he may appear to the application and make his answer before the entry of the order. But it is held that a positive denial under oath is a sufficient answer to the application as well as a discharge of the rule. A New York case expresses the law on this subject as follows: "If the party answer distinctly and unevasively, that as to all or any of the papers or documents or entries of which a discovery is sought, there are no such papers or documents in his possession or under his control, or that there are no entries relating to the specified subject matter, or except such as he has furnished copies of, the applicant must abide by the answer so far as the proceedings for a discovery are concerned. If dissatisfied with the result of the proceedings he must examine him as a witness or rely on such other evidence as he may be able

<sup>99</sup> Tidd Pr. §§ 595, 596. See *Iasigi v. Brown*, 1 Curt. (U. S.) C. C. 401.

<sup>100</sup> 1 Greenleaf Ev. §§ 477, 478; 1 Tidd Pr. 596; *Rex v. Justices of Surrey*, Sayer, 144; *Rex v. Shelley*, 3 T. R. 141; *Rex v. Hollister*, Cas. Temp. Hardw. 245. Such, in substance, is the law on this subject as stated by Greenleaf and the older authorities; but, as already shown, some changes have been made in modern times. We are not here,

however, concerned with the substantive law as to the right to inspect books, and further consideration of the subject is unnecessary in this connection. See, however, *State v. King*, 154 Ind. 621, 57 N. E. 535; *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418; *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405.

to command.”<sup>101</sup> An answer sworn to by one member of a firm is sufficient without requiring each to answer.<sup>102</sup> If documents, papers or books are produced it must be in such manner as to operate as a discharge of the rule and be in compliance with the order; and if necessary to a full compliance an explanatory statement under oath should accompany the document.<sup>103</sup>

§ 1409. **Production—Cases of tort.**—Discovery was denied in the earlier English cases in civil actions where the subject matter might become the foundation of a criminal charge. In one such case the judge said: “The sole object is to prove the truth of the libel, or, in other words, to prove the truth of the criminal matter charged; every question asked must necessarily be with a view to that end, and a party is not bound to answer any question, however apparently indifferent, which is in any manner connected with the criminal charge.”<sup>104</sup> In a later case, after reviewing the English authorities another justice said: “I have looked into the authorities which tend much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort.”<sup>105</sup> The American cases have very generally followed this English rule. And in a comparatively recent case the rule was stated thus: “The inspection and copy of the paper, if it be what the libel asserts it is, would tend to criminate the appellant; and nothing is better settled than that a bill of discovery will not lie to compel a party to discover that which if produced or answered in the affirmative, will subject him to punishment or render him infamous, or expose him to a penalty or a forfeiture. And it is not necessary for the party to make oath or affidavit that he believes the paper or answer would tend to criminate him or subject him to punishment, or expose him to a penalty

<sup>101</sup> Hoyt v. American Exch. Bank, 1 Duer (N. Y.) 652; Woods v. De Figanieri, 1 Rob. 681; Ahoyke v. Wolcott, 4 Abb. Pr. (N. S.) 41; Bradstreet v. Bailey, 4 Abb. Pr. (N. S.) 233; Whitman v. Weller, 39 Ind. 515; Hylton v. Brown, 1 Wash. (U. S.) C. C. 298; Perrow v. Lindsay, 52 Hun (N. Y.) 115.

<sup>102</sup> Seligman v. Real Estate, &c. Co. 20 Abb. N. Car. (N. Y.) 210.

<sup>103</sup> Low v. Graydon, 14 Abb. Pr. (N. S.) 443.

<sup>104</sup> Thorpe v. Macaulay, 5 Mad. 218; Paxton v. Douglas, 16 Ves. 239, 19 Ves. 220; Green v. Weaver, 4 Sim. 430; Maccallum v. Turton, 2 Yo. & Jerv. 183; Whitmore v. Francis, 8 Price Exch. 616; Mason v. Gardiner, 4 Bro. Ch. 322.

<sup>105</sup> Glynn v. Houston, 1 Keen (Eng. Ch.) 329.

or forfeiture."<sup>106</sup> The rule has been applied where the penalty or forfeiture was barred by the statute of limitations.<sup>107</sup> It has been held that a bill of discovery would not be allowed nor inspection of papers ordered in actions for libel or slander.<sup>108</sup>

But what seems to be the better rule and one which is supported by some authorities is that in actions of torts for damages, where neither penalty nor forfeiture can be recovered, production of books, papers or documents will be ordered.<sup>109</sup>

§ 1410. **Production—Denied.**—The right to compel the production of books and documents is not absolute; its exercise depends on the circumstances surrounding a case, and the granting of it rests in the sound discretion of the court. It therefore becomes important to know when an application for the production of documents will be denied. The production of documents will not be ordered for the purpose of giving the adverse party an opportunity to find out whether or not there may be some ground or other for a cause of action on which to make out his complaint. Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them, has been denominated a fishing examination and is always regarded as oppressive, and as such are always denied.<sup>110</sup> A general rule on

<sup>106</sup> *Kraus v. Sentinel Co.* 62 Wis. 660; *Smithson v. Stanton*, 7 D. C. 6; *McIntyre v. Mancius*, 16 Johns. (N. Y.) 592; *Taylor v. Bruen*, 2 Barb. Ch. (N. Y.) 301; *Union Bank v. Barker*, 3 Barb. Ch. (N. Y.) 358; *M'Keon v. Lane*, 2 Hall (N. Y.) 520; *United States v. Saline Bank*, 1 Pet. (U. S.) 100; *Stewart v. Drasha*, 4 McLean (U. S.) 563; *Northrop v. Hatch*, 6 Conn. 361; *Higdon v. Heard*, 14 Ga. 255; *Adams v. Porter*, 1 Cush. (Mass.) 170; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87; *Northwestern Bank v. Nelson*, 1 Gratt. (42 Va.) 108; *Austin v. Richardson*, 42 Va. 310.

<sup>107</sup> *Northrop v. Hatch*, 6 Conn. 361.

<sup>108</sup> *March v. Davison*, 9 Paige (N. Y.) 580; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Bailey v. Dean*, 5 Barb. (N. Y.) 297; *Byass v. Sullivan*, 21

*How. Pr. (N. Y.)* 50; *Brandon Mfg. Co. v. Bridgman*, 14 Hun (N. Y.) 122; *In re Tappan*, 9 How. Pr. (N. Y.) 394; *Phoenix v. Dupuy*, 7 Daly (N. Y.) 238; *Corbett v. De Comeau*, 44 N. Y. Super. Ct. 306; *Morgan v. Watson*, 2 Whart. (Pa.) 10; *Tupling v. Ward*, 6 Hurlst. & N. 749.

<sup>109</sup> *Moelling v. Lehigh Coal, &c. Co.* 9 Phila. (Pa.) 222; *Tuttle v. Mechanic's, &c. Co.* 6 Whart. (U. S.) 216; *Atwill v. Ferrett*, 1 Blatchf. (U. S.) 39; *Finch v. Rikeman*, 1 Blatchf. (U. S.) 301; *East India Co. v. Evans*, 1 Vern. 306; *Sloane v. Heatfield*, Bunbury 18; *Taylor v. Compton*, Bunbury 95; *Hare Discovery*, 118.

<sup>110</sup> *Lester v. People*, 150 Ill. 408, 420; *Whitman v. Weller*, 39 Ind. 515; *Brownell v. Nat'l Bank, &c.* 20 Hun (N. Y.) 517; *Walker v.*

this subject is stated as follows: "If the discovery is plainly attainable by competent and available testimony other than that of the party, a production of books should not be allowed without special circumstances. If it is attainable by an examination of the party as a witness it should also be refused, except upon some special ground."<sup>111</sup>

Production will not be ordered where it is shown that witnesses cannot establish the same facts without the aid of the documents sought.<sup>112</sup> Nor will production be ordered of books and papers where the contents and entries sought for are not shown of themselves to be evidence, but are only claimed to contain information by which evidence may be obtained.<sup>113</sup> Nor where the applicant himself has access to the desired records.<sup>114</sup> Nor where the names of persons are sought.<sup>115</sup> Nor will a court compel a party to produce papers or documents containing evidence which would subject him to a forfeiture.<sup>116</sup>

The production of papers and documents will not be ordered for the purpose of perpetuating testimony.<sup>117</sup> The order for discovery will be denied where it appears that the evidence is privileged.<sup>118</sup>

The application will be denied and an order refused where a party has been guilty of unreasonable and unnecessary delay, and in cases where the application is not made until after the beginning of the trial.<sup>119</sup>

Granite Bank, 44 Barb. (N. Y.) 39; Colgate v. Buckingham; Mott v. Consumers' Ice Co. 52 How. (N. Y.) 148, 244; Pegram v. Carson, 18 How. Pr. (N. Y.) 519; Phelps v. Platt, 54 Barb. (N. Y.) 557; Cutter v. Poole, 54 How. Pr. (N. Y.) 311; Woods v. De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522.

<sup>111</sup> Commercial Bank, &c. v. Dunham, 13 How. Pr. (N. Y.) 541.

<sup>112</sup> Gelston v. Hoyt, 1 Johns. Ch. (N. Y.) 543; Woods v. De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522.

<sup>113</sup> Woods v. De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522; Morrison v. Sturges, 26 How. Pr. (N. Y.) 177; Merguelle v. Continental, &c. Co. 7 Rob. (N. Y.)

77; Holtz v. Schmidt, 34 N. Y. Super. Ct. 28.

<sup>114</sup> Charlick v. Flushing R. Co. 10 Abb. Pr. (N. S.) 130; Meakings v. Cromwell, 1 Sandf. (N. Y.) 698.

<sup>115</sup> Opdyke v. Marble, 44 Barb. (N. Y.) 64.

<sup>116</sup> United States v. Twenty-eight Packages, Gilp. (U. S.) 306.

<sup>117</sup> Keeler v. Dusenbury, 1 Duer (N. Y.) 660.

<sup>118</sup> Mott v. Consumers' Ice Co. 52 How. Pr. (N. Y.) 148, 244.

<sup>119</sup> Walmsley v. Nelson, 3 Abb. N. Cas. 127; Jackling v. Edmonds, 3 E. D. Smith (N. Y.) 539; Hooker v. Matthews, 3 How. Pr. (N. Y.) 329; Jackson v. Ives, 22 Wend. (N. Y.) 637; Schmidt v. Kiser, 75 Iowa, 457.



The court has no power, it has been held, to compel a party to an action to produce articles which are the subject matter of the suit, but which are neither books, documents nor evidence of themselves, for the inspection and examination of third persons for the purpose of qualifying them to testify as experts.<sup>120</sup>

Private papers and documents of the person cannot be seized against his will, and possession taken of them for the purpose of using them in evidence against him either to convict him of a crime or to forfeit his goods. Such proceedings are prevented by the constitutional provision "that no person shall be compelled to testify against himself in a criminal cause."<sup>121</sup>

**§ 1411. Third parties not required to produce books.**—The general rule is that the court has no power over a person who is not a party to the action to compel him either to produce in court or to deposit with an officer papers or documents for the inspection or for use as evidence by a party to the action. This rule has always been held to apply to a third person having in his possession papers and documents of a party to the suit.<sup>122</sup> It has also been held that a court has the power to compel a third person, not a party to the action, to produce on the trial of a case to be used as evidence documents or papers with which he has been entrusted by a party to the suit.<sup>123</sup>

**§ 1412. No production to discover evidence of adversary.**—Under the chancery practice a discovery was not permitted whereby defendant could call for documents constituting the title of the plaintiff, the object of the discovery being to ascertain the contents of papers in the possession of the adverse party to be used as evidence in the trial. If such papers were produced the originals will be admitted; but if not produced copies may then be used as evidence. This shows that the purpose of the discovery is to obtain evidence which the party wishes to use on the trial of the case in his own behalf, and not

<sup>120</sup> *Ansen v. Tuska*, 1 Rob. (N. Y.) 663.

<sup>121</sup> *Boyd v. United States*, 116 U. S. 616; *State v. Davis*, 108 Mo. 666, 32 Am. St. 640; *Entick v. Carrington*, 19 How. St. Tr. 1029. See an extended note on this subject to *State v. Davis*, 32 Am. St. 643.

<sup>122</sup> *Davenbagh v. McKinnie*, 5 Cow.

(N. Y.) 27; *Morley v. Green*, 11 Paige (N. Y.) 240; *Boorman v. Atlantic, &c. R. Co.* 78 N. Y. 599; *Rose v. King*, 5 S. & R. (Pa.) 241; *Henry v. Travelers' Ins. Co.* 35 Fed. 15; *Ex parte Llewellyn*, 8 Lond. Jur. R. 816.

<sup>123</sup> *Dickerson v. Talbot*, 53 Ky. (14 B. Mon.) 60.

the evidence to be used by the adverse party. So it has been held that a party cannot require the discovery or production of the evidences of the title of his adversary.<sup>124</sup> As said by one court: "The rule, as generally stated, is that the objects to be inspected must relate to the maintenance of the position taken by the applicant, and not to that of the opposite party."<sup>125</sup>

§ 1413. **Privileged documents.**—A party is not necessarily exempt from producing books or papers material to the action merely because they are private,<sup>126</sup> and letters between one party and the other party or third persons are not ordinarily privileged from discovery.<sup>127</sup> But an attorney cannot be compelled to produce privileged papers of his client in his possession.<sup>128</sup> And the same has been held as to the books of a physician and surgeon containing privileged information derived from his patient.<sup>129</sup> There are also cases in which the interest of the public may demand that the documents should not

<sup>124</sup> Meakings v. Cromwell, 1 Sandf. (N. Y.) 698; Powers v. Elmendorf, 4 How. Pr. (N. Y.) 60, 2 Code (N. Y.) 44; Brevoort v. Warner, 8 How. Pr. (N. Y.) 321; Livermore v. St. John, 4 Robt. (N. Y.) 12; Union Stone Works v. Caswell, 48 Kans. 689; Cooper Eq. Pl. 58; Mange v. Guenat, 6 Whart. (Pa.) 641; Stichter v. Tillinghast, 43 Hun (N. Y.) 95; Adams v. Cavanaugh, 37 Hun (N. Y.) 232; Mott v. Consumers' Ice Co. 52 How. Pr. (N. Y.) 148, 244; Bailey v. Williams Mfg. Co. 9 N. Y. St. 518; Sanger v. Seymour, 4 N. Y. St. 451; James v. Cox, 3 How. Pr. (N. Y.) 36; Douglas v. Delano, 20 Week. Dig. (N. Y.) 85; Shoe, &c. Assn. v. Bailey, 49 Super. Ct. (N. Y.) 385; Andrews v. Townshend, 2 Civ. Proc. (N. Y.) 76; Gould v. McCarty, 11 N. Y. 575; Haskell v. Haskell, 3 Cush. (Mass.) 540; Downie v. Nettleton, 61 Conn. 593; Hylton v. Brown, 1 Wash. C. C. (U. S.) 298; Lester v. People, 150 N. Y. 408; Seligman v. Real Estate, &c. Co. 20 Abb. N. Cas. 210;

1 Pomeroy Eq. § 201; 2 Story Eq. §§ 1483, 1485, 1490.

<sup>125</sup> Sanger v. Seymour, 42 Hun (N. Y.) 641; Andrews v. Townshend, 14 Weekly Dig. (N. Y.) 243.

<sup>126</sup> Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; In re Dunn, 9 Mo. App. 255. See, also, Tetley v. Easton, 11 C. B. 643; Howe v. McKernan, 30 Beav. 557; Luscumbe v. Steer, 37 L. J. Eq. 119; Williams v. Coal Co. 60 Ill. 153.

<sup>127</sup> Taylor v. Milner, 11 Ves. 41; Greenlaw v. King, 1 Beav. 137; Whitbread v. Gurney, 1 Younge 541; Hopkinson v. Lord Burghley, L. R. 2 Ch. 447; Livermore v. St. John, 4 Robt. 12.

<sup>128</sup> Durkee v. Leland, 4 Vt. 612; Crosby v. Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; Mitchell's Case, 12 Abb. Pr. (N. S.) 264; State v. Douglass, 20 W. Va. 770; Commonwealth v. Moyer, 15 Phila. (Pa.) 397.

<sup>129</sup> Mott v. Consumers' Ice Co. 52 How. Pr. (N. Y.) 148, 244.

be produced.<sup>130</sup> So there are cases in which part of a book may be sealed up or the like when such part is privileged from production and inspection.<sup>131</sup>

As elsewhere shown, there are cases in which, under the Constitution, and even according to the common law, documents of a criminating character cannot be used in evidence against a party. But it is not clear as to how far, if at all, this principle may operate to justify the refusal to permit a mere inspection of them before trial. It is said by the Supreme Court of the United States, however, that "It is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."<sup>132</sup>

**§ 1414. The order—Time and place of inspection.**—An order for the inspection of documents will generally be denied where it appears that the applicant already has the necessary information or access to the documents.<sup>133</sup> So it has been held if it does not appear that they are within the state.<sup>134</sup> And, as already shown, it should not be granted to enable a party to "fish for evidence."<sup>135</sup> For this reason,

<sup>130</sup> *Reg. v. Russell*, 7 Dowl. Pr. 693. And see *Corbett v. Gibson*, 16 Blatchf. (U. S. C. C.) 334; *Spielman v. Flynn*, 19 Neb. 342.

<sup>131</sup> See *Titus v. Cortelyou*, 1 Barb. (N. Y.) 444; *Elder v. Bogardus*, Edm. Sel. Cas. 110; *Carew v. White*, 5 Beav. 172; *Hunt v. Hewitt*, 7 Ex. 236. See, also, *Warrick v. Queen's College*, L. R. 4 Eq. 254; *Pyncheon v. Day*, 118 Ill. 9, 7 N. E. 65.

<sup>132</sup> *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524-533. See, also, *Logan v. Pennsylvania R. Co.* 132 Pa. St. 403; *Lester v. People*, 150 Ill. 408, 41 Am. St. 375; ante §§ 1011, 1013 1409, 1410.

<sup>133</sup> *McAllister v. Pond*, 15 How. Pr. (N. Y.) 299, 6 Duer (N. Y.) 702; *Russell & Co. v. McSwegen*, 79 N. Y. S. 440; *Seymour v. Seymour*, 4 Johns. Ch. (N. Y.) 411; *Lindsley v. James*, 3 Coldw. (Tenn.) 484.

<sup>134</sup> *Snow, Church & Co. v. Snow-Church, &c. Co.* 80 N. Y. S. 512.

<sup>135</sup> *Arnold v. Pawtucket, &c. Co.* 18 R. I. 189, 26 Atl. 55; *Brownell v. Bank, &c.* 20 Hun (N. Y.) 517; *Lester v. People*, 150 Ill. 408, 41 Am. St. 375. In *1 Rice Ev.* 242, it is said: "Where, on an application for an order for the discovery of books and papers, the entries sought for are not shown to be

if for no other, the order should specify or describe with reasonable certainty the books, papers or other documents to be inspected.<sup>186</sup> As said in one case: "An order, either for the inspection of books and making copies, or for their production in court, should so specify or describe them that the party who is to furnish inspection or produce the books may know what books are to be inspected or produced. The order should not be made in such terms as to operate as a license to the party obtaining it to search the books and papers of his adversary at pleasure, or to require him to produce books which may be of no use when produced."<sup>187</sup>

So the order should usually state the time and mode of inspection. It would, at all events, be a very unusual and improper order that would leave it to the applicant to interfere with the adverse party's business and examine books and papers at any or all times and places as the applicant himself might desire. In one case an order was held on appeal to have been erroneously granted, not only because it was too broad as to the documents to be inspected, but also because it

evidence, but only to contain information by which evidence may be obtained, the order can not be granted. The power of discovering the contents of a written document will hardly be stretched to cover those which only furnish information to enable the applicant to ferret out evidence of witnesses; or where it is not shown that witnesses can not establish the same facts without the aid of such entries. *Woods v. De Figanieri*, 25 How. Pr. (N. Y.) 522; *Gelston v. Hoyt*, 1 Johns. Ch. (N. Y.) 543, 1 L. ed. 240."

<sup>186</sup> *Whitman v. Weller*, 39 Ind. 515, 519; *State v. District Court*, 27 Mont. 441, 71 Pac. 602; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175 (and it should not extend beyond the legitimate requirements of the case); *DeBrunoff v. McClure-Tissot Co.* 82 N. Y. S. 38, 83 App. Div. 640; *Fidelity, &c. Co. v. F. W. Seagrist, Jr. Co.* 79 App. Div. 614, 80 N. Y. S. 277; *Phelps v. Platt*, 54 Barb. (N. Y.) 557. In

the *Montana* case the order was held too broad in many respects, and it was said that the order should not only have been confined to certain books, but should also have been confined to such parts as related to the matter in controversy.

<sup>187</sup> *Whitman v. Weller*, 39 Ind. 515, 519. It is also held, in the same case, that if a copy of the book or paper, or the part shown to be material, be furnished, with consent that it may be used in evidence, the court need not, except when special reasons exist, compel the production of the original. See, also, *Pyncheon v. Day*, 118 Ill. 9, 7 N. E. 65. But in some instances, where a trust relation exists, it has been said that a very general inspection of books should be permitted. See *Brevoort v. Warner*, 8 How. Pr. (N. Y.) 325; *Manly v. Bonnell*, 11 Abb. N. Cas. (N. Y.) 123; *Allen v. Allen*, 33 N. Y. St. 876.

contained no designation or limitation of the time of inspection.<sup>138</sup> But an order permitting an inspection of papers in the defendant's possession at a specified time and at "such other times as the said referee may appoint," has been held sufficient and proper.<sup>139</sup> In another case the court ordered books to be deposited in the clerk's office, but provided in such order that some representative of the party producing them might be present while the moving party was making his examination, and that, as to such parts of the books, if any, as the former might claim should not be disclosed, the clerk might inspect in the first instance, and if either party should not be satisfied with his decision the matter should then be presented to the judge.<sup>140</sup> But, ordinarily, the document will be left in the hands of the owner or his attorney, with a provision in the order for him to permit it to be inspected by the opposite party or his attorney at a proper time or times, or, in some instances, by witnesses.<sup>141</sup>

**§ 1415. Under United States statute.**—Section 724 of the Revised Statutes of the United States provides for the production in actions at law of books and writings, in the possession or power of a party, which contain evidence pertinent to the issue, in cases and under circumstances where their production might be compelled by the ordinary rules of proceeding in chancery. It has been held that the power given in this section includes the power to grant an inspection

<sup>138</sup> *State v. District Court*, 27 Mont. 441, 71 Pac. 602. See, also, *Gray v. Schneider*, 119 Fed. 474.

<sup>139</sup> *Hallett v. American, &c. Co.* 83 N. Y. S. 110.

<sup>140</sup> *Gray v. Schneider*, 119 Fed. 474.

<sup>141</sup> See *Ely v. Mowry*, 12 R. I. 570, 572; *Hilyard v. Township of Harrison*, 37 N. J. L. 170; *Beckford v. Wildman*, 16 Ves. 438. This is especially true where the books are in daily use in the owner's business, or there are other reasons why the possession should be left with the owner. But there are many instances in which, where it would not unduly interfere with the owner's business, or the like, doc-

uments have been ordered impounded or left with the court or clerk of the court for inspection. See *Townsend v. Laurence*, 9 Wend. (N. Y.) 458; *Faircloth v. Jordan*, 15 Ga. 511. But it has been held that even then they may be withdrawn after they have been left a reasonable time to inspect and copy. *Stow v. Betts*, 7 Wend. (N. Y.) 536. As to inspection by witnesses or third persons, see 3 *Taylor Ev.* § 1809; *Attorney General v. Whitwood, &c. Board*, 19 W. R. 1107, 40 L. J. Ch. 592; *Swansea Vale R. Co. v. Budd*, L. R. 2 Eq. 274, 35 L. J. Ch. 631; *Livingston v. Curtis*, 12 Hun (N. Y.) 124.

before trial, with permission to make copies.<sup>142</sup> But this does not seem to apply to suits in equity,<sup>143</sup> and does not prevent equitable relief by bill of discovery in a proper case.<sup>144</sup>

The practice under this statute seems to be somewhat unsettled;<sup>145</sup> but it is said that, "briefly stated, the motion for a rule to produce must be in a case at law, and on due notice to the opposite party, and it must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issues, and that the case and circumstances are such that the party might be compelled to produce the same as therein provided."<sup>146</sup> It is held, however, that a somewhat general description of the books or writings, in the application and notice, will be sufficient if the subject-matter to which they relate is specifically mentioned, and that discovery will generally be awarded where it will promote justice; but it is also held in the same case that it will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another; nor will it be extended beyond the legitimate requirements of the case.<sup>148</sup>

**§ 1416. Effect of inspection.**—There is some conflict among the authorities as to whether calling for the production of documents and inspection of them when produced will operate to make them evidence, but the better rule is that the mere inspection of them before trial

<sup>142</sup> *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175 (elaborately considering the question and reviewing the authorities); *Exchange Nat. Bank v. Washita Cattle Co.* 61 Fed. 190; *Tucker v. Phoenix Assur. Co.* 67 Fed. 18. See, also, *Bank v. Tayloe*, 2 Cranch (U. S.) C. C. 427. That this, rather than the state law, governs the federal courts as to the production of documents for use in evidence, see *Gregory v. Chicago, &c. R. Co.* 10 Fed. 529; *Exchange Nat. Bank v. Washita Cattle Co.* 61 Fed. 190. But see query in first case cited in this note.

<sup>143</sup> *Bischoffsheim v. Brown*, 24 Blatchf. (U. S.) 173, 29 Fed. 341; *United States v. Babcock*, 3 Dill (U. S.) 566; *Guyot v. Hilton*, 32 Fed. 743.

But compare *Coit v. North Carolina, &c. Co.* 9 Fed. 577.

<sup>144</sup> *Smythe v. Henry*, 41 Fed. 705, 715.

<sup>145</sup> *Caspary v. Carter*, 84 Fed. 416; *Gray v. Schneider*, 119 Fed. 474.

<sup>146</sup> Note in 41 Am. St. 390, where the general subject of discovery is well treated. Citing *Merchants' Nat. Bank v. State Nat. Bank*, 3 Clif. (U. S.) 201, 203; *Lowenstein v. Carey*, 12 Fed. 811, 812; *Gregory v. Chicago, &c. R. Co.* 10 Fed. 529; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23. See, also, *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175; *Caspary v. Carter*, 84 Fed. 416; 2 *Desty Fed. Proc.* § 244; *Iasigi v. Brown*, 1 Curt. (U. S.) 401.

<sup>148</sup> *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175.

will not do so.<sup>149</sup> And it is held in a well reasoned case that, even though a book is produced and inspected at the trial, where it is not introduced in evidence and no questions are asked with reference to it, the party so inspecting it is not bound to put it in evidence.<sup>150</sup> In the course of the opinion it is said: "The claim that it gives the party calling for a paper an unfair advantage, if he may inspect it and then decline to put it in evidence, seems rather specious than sound. The same objection would lie in case of bills for discovery; but it was the settled rule that an answer, though under oath, was evidence only for the party who obtained it. The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If, on inspection, the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party. The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice."

<sup>149</sup> See *Austin v. Thompson*, 45 N. H. 113 (reviewing many decisions); *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 11.

<sup>150</sup> *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54. See, also, authorities

cited in last note *supra*. But compare *Blake v. Russ*, 33 Me. 360; *Clark v. Fletcher*, 1 Allen (Mass.) 53; *Randall v. Chesapeake, &c. Co.* 1 Har. (Del.) 284.

## CHAPTER LXIX.

### PRODUCTION OF DOCUMENTS FOR USE AT TRIAL.

Sec.	Sec.
1417. Notice to produce for use at trial.	1435. Refusal to produce—Party bound.
1418. Notice—Purpose and necessity.	1436. Rule denied.
1419. Notice—Sufficient time.	1437. Failure to produce—Effect.
1420. Sufficient notice—Examples.	1438. Notice—When not necessary.
1421. Insufficient notice — Examples.	1439. Duplicate originals—Notice unnecessary.
1422. Time extended.	1440. Instrument to be proved is a notice.
1423. Paper in court—Notice unnecessary.	1441. Production required from nature of action.
1424. Notice—On whom served.	1442. Collateral matters—Production unnecessary.
1425. Notice—Written or parol.	1443. Document in third person's possession.
1426. Notice—Proof of service.	1444. Production — Third person out of court's jurisdiction.
1427. Notice—Preliminary proof.	1445. Production—Effect as evidence for party producing.
1428. Proof of notice—Opportunity to produce.	1446. Production—Instrument not evidence.
1429. Preliminary proof — Discretion of court.	1447. Instruments not evidence—New Hampshire and Pennsylvania rules.
1430. Possession of document.	1448. Instruments not evidence—New York rule.
1431. Production—Proof of execution not required.	
1432. Notice—Description of document.	
1433. Notice—Examples of sufficient description.	
1434. Notice—Examples of insufficient description.	

§ 1417. Notice to produce for use at trial.—In addition to and as distinct from the production of documents for discovery and inspection



tion, a party may give notice to his adversary requiring the production of original papers and documents for use at the trial of the case. This practice simply requires a notice in writing to be served on the adverse party, within a reasonable time before the trial, to produce at the trial the originals of certain specified documents known to be in his possession or under his control. Under this practice the court is not called upon to make any order, or, in the first instance, to pass upon the sufficiency of the notice either as to form or substance; and the notice does not make it obligatory upon the adverse party to produce the documents. The only penalty inflicted for refusing to produce original instruments is that the party demanding their production may make proof of the contents in their absence. This practice does not contemplate an examination or inspection of papers or documents in advance of the trial, but proceeds upon the theory that the party giving the notice is familiar with the character and contents of the document, and that he desires to make use of the same on the trial of the case.<sup>1</sup> The practice is controlled by statute in most of the jurisdictions of the United States, but it is held that the statutory mode of giving notice does not supersede the common law mode of giving notice to produce and proving contents of an instrument in the possession or power of the opposite party.<sup>2</sup>

<sup>1</sup> *Brown v. Isbell*, 11 Ala. 1009; *Littleton v. Clayton*, 77 Ala. 571; *Foster v. State*, 88 Ala. 182; *Parish v. Weed Sew. Mach. Co.* 79 Ga. 682; *Gafford v. American Mort. &c. Co.* 77 Iowa, 736; *First Nat'l Bank v. Mansfield*, 48 Ill. 494; *Roche v. Day*, 20 Ill. App. 417; *Barmby v. Plummer*, 29 Neb. 64; *Faribault v. Ely*, 13 N. Car. (2 Dev.) 67; *McGuffin v. Dinsmore*, 4 Abb. New Cas. 241; *Smith v. MacDonald*, 1 Abb. New Cas. 350; *Dick v. Phillips*, 41 Hun (N. Y.) 603; *Francis v. Porter*, 88 Hun (N. Y.) 325; *Drake v. Weinman & Co.* 12 Misc. (N. Y.) 65; *Talbot v. Doran*, 6 Daly (N. Y.) 174; *Levey v. New York, &c. R. Co.* 53 N. Y. Super. Ct. 267; *Chaffee v. Equitable, &c. Life Asso.* 56 N. Y. Super. Ct. 267; *Bloom v. Pond's Extract Co.* 27 Abb. New Cas. 366; *Fenton v. Demp-*

*sey*, 10 N. Y. St. 733; *Black v. Curry*, 1 N. Y. Civ. Proc. 193; *McDonald v. Carson*, 95 N. Car. 377; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; *Merchants' Nat'l Bank v. State Nat'l Bank*, 3 Clifford, 201; *Life, &c. Ins. Co. v. Mechanic, &c. Ins. Co.* 7 Wend. 31; *Cutter v. Pool*, 3 Abb. New Cas. 130; *Bas v. Steele*, 3 Wash. (U. S.) 381; *Dunham v. Riley*, 4 Wash. (U. S.) 126; *Hylton v. Brown*, 1 Wash. (U. S.) 298; *Thompson v. Selden*, 20 How. (U. S.) 194; *Lester v. People*, 150 Ill. 408, 41 Am. St. 375, and notes 388; *Roche v. Day*, 20 Bradw. (Ill.) 417; *Bentley v. People*, 104 Ill. App. 353; *Wertheim v. Continental, &c. Co.* 15 Fed. 716, and notes; *Dwyer v. Collins*, 7 Ex. 639; 1 Wharton Ev. § 155.

<sup>2</sup> *McLain v. Winchester*, 17 Mo. 49.

§ 1418. **Notice—Purpose and necessity.**—The purpose of giving notice to an adverse party to produce original papers, books or documents, to be used as evidence at the trial of a case, is to lay the foundation for the introduction of secondary evidence. And before a party can prove the contents of papers or documents he must make satisfactory proof to the court that his adversary was served with written notice before the trial to produce such papers and documents, and that he has neglected or refused to do so.<sup>3</sup> He cannot compel his adversary to produce the desired documents; but he must make all reasonable efforts to procure them; and as he has no control over the papers or documents, nor power to compel the opposite party to surrender, he can only request that he do so, and if his adversary refuse to produce the original, he may then resort to the best evidence in his power to make proof of the contents of the instruments.<sup>4</sup>

On the question of the necessity of notice the Supreme Court of Maine approved the following rule: "The principle on which notice to produce a document is required by law, is merely to give a sufficient opportunity to the opposite party to have the document in court to produce if he likes, and so secure the best evidence of its contents, and if he does not, to enable his adversary to give secondary evidence. Therefore, where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence."<sup>5</sup>

<sup>3</sup> *Dade v. Ætna Ins. Co.* 54 Minn. 336; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Bright v. Young*, 15 Ala. 112; *Littleton v. Clayton*, 77 Ala. 571; *Barton v. Osborn*, 6 Blackf. (Ind.) 145; *Smith v. Reed*, 7 Ind. 242; *Wilson v. State*, 13 Ind. 341; *Newton v. Donnelly*, 9 Ind. App. 359; *Mumford v. Thomas*, 10 Ind. 167; *Williams v. Jones*, 12 Ind. 561; *Duringer v. Moschino*, 93 Ind. 495; *Narragansett Bank v. Atlantic Silk Co.* 3 Metc. (Mass.) 282; *Commonwealth v. Parker*, 56 Mass. (2 Cush.) 212; *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Greenough, &c. Co. v. Sheldon*, 9 Iowa, 503; *Horseman v. Todhunter*, 12 Iowa, 230; *Gafford v. American, &c. Co.* 77 Iowa, 736; *M'Dowell v. Hall*, 5 Bibb (Ky.) 610; *Bank, &c.*

*v. M'Williams*, 2 J. J. Marsh (Ky.) 256; *McQueen v. Sandel*, 15 La. Ann. 140; *Lowell v. Flint*, 20 Me. 401; *Thayer v. Middlesex, &c. Ins. Co.* 10 Pick. (Mass.) 326; *Cooper v. Granberry*, 33 Miss. 117; *Webster v. Clark*, 30 N. H. 245; *Truax v. Truax*, 2 N. J. L. 121; *Waring v. Warren*, 1 Johns. (N. Y.) 340; *Jackson v. Livingston*, 7 Wend. (N. Y.) 136; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267; *Dennis v. Barber*, 6 S. & R. (Pa.) 420; *Reading R. Co. v. Johnson*, 7 W. & S. (Pa.) 317; *Sally v. Gunter*, 13 Rich. (S. Car.) 72.

<sup>4</sup> *Mattocks v. Stearns*, 9 Vt. 326; *Cooper v. Granberry*, 33 Miss. 117.

<sup>5</sup> *Dwyer v. Collins*, 7 Exch. 639; *Brown v. Isbell*, 11 Ala. 1009; *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587.

§ 1419. **Notice—Sufficient time.**—No inflexible rule can be given as to the length of time the notice should be served before trial. This must be governed by the situation of the parties and the circumstances of each particular case. One rule is that the notice must be so served as to give the party a reasonable time in which to produce the desired papers or documents.<sup>6</sup> Another general rule is that the notice should be such as to enable the party under all the circumstances of the case to comply with it.<sup>7</sup> It should appear that the party to whom the notice is given has had sufficient time *prima facie* to produce the documents.<sup>8</sup> Another statement of the rule is that the notice must be reasonable. What is reasonable depends on the circumstances of each particular case.<sup>9</sup>

§ 1420. **Sufficient notice—Examples.**—Under the rule that the sufficiency of the notice is governed by the situation of the parties and all the circumstances of the case, it has been frequently held that notice to produce papers and documents given during the progress of the trial is sufficient where it is made to appear that such paper or document is either in the possession of the adverse party, who is present in court, or that it is easy of access.<sup>10</sup> The rule as stated by one court is: "Where the paper is in court, or so near the place where the court is sitting that it can be obtained without delaying the trial, and without material inconvenience to the party, a notice given after the trial has commenced is sufficient; and where, from the nature of the instrument or from its connection with the cause, it may fairly be presumed to be in the possession of the party or his counsel in court, he ought affirmatively to deny the fact, or the notice should be held good. But neither a party nor his attorney is bound to leave the court and go for papers or books at a distance."<sup>11</sup> The reasons for requiring notice before the trial do not apply when the party is present at the trial, and has the paper or document in his possession, and can produce it

\* *Greenough, &c. Co. v. Sheldon*, 9 Iowa, 503; *Jefford v. Ringgold*, 6 Ala. 544.

<sup>7</sup> *Divers v. Fulton*, 8 Gill & J. (Md.) 202; *Glenn v. Rogers*, 3 Md. 312.

<sup>8</sup> *Jefford v. Ringgold*, 6 Ala. 544.

<sup>9</sup> *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

<sup>10</sup> *Atwell v. Miller*, 6 Md. 10, 61

*Am. Dec.* 294; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Jack v. Rowland*, 98 Ill. App. 352; *Downer v. Button*, 26 N. H. 338; *Droyer v. Collins*, 12 E. L. & E. 532; 2 *Phillips Ev.* 527.

<sup>11</sup> *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 *Am. Dec.* 549.

immediately.<sup>12</sup> It was held that notice to produce a book of accounts, given on the evening preceding the trial, was sufficient where it was shown that the party's place of business was very near the court house.<sup>13</sup> So a notice served on the 13th, where the trial was set for the 15th of the same month, was held sufficient.<sup>14</sup> And where a trial was postponed from one session to another, and notice served in time for the first session, it was held sufficient without any additional notice.<sup>15</sup> A sufficient notice served on the party will not be affected or invalidated by an insufficient notice served on the attorney.<sup>16</sup>

§ 1421. **Insufficient notice—Examples.**—Where a trial was held in Illinois, and it was shown that the defendant lived in New York, a notice on the defendant's attorney served two days before the trial was held insufficient where it was admitted that the attorney did not have in his possession the letter described in the notice.<sup>17</sup> And a notice served on the attorney of a party on the morning of the day when secondary evidence was offered was held insufficient.<sup>18</sup> And where notice was given by depositing a letter in the letterbox of the office of the plaintiff's attorney at half-past eight o'clock of the evening before the day of the trial, it was held to be too late.<sup>19</sup> So, notice to produce letters in the possession of a party in an adjoining state was held insufficient where, in order to reach the trial they would have to be forwarded on the first mail after the receipt of a telegram.<sup>20</sup>

§ 1422. **Time extended.**—A party should not be permitted to give parol or secondary evidence of the contents of a paper or document which his adversary has failed to produce where the latter has had insufficient time after the service of notice to procure the desired instruments. And where the party served with such notice is unwilling that the contents of the instrument should be proved by parol, and is willing to produce the document desired if sufficient time is given, he should apply to the court immediately on the service of the notice or

<sup>12</sup> Reynolds v. Quattlebum, 2 Rich. (S. Car.) 140; Freel v. Market St. &c. R. Co. 97 Cal. 40.

<sup>13</sup> Shreve v. Dulany, 1 Cranch (U. S.) C. C. 499; Lloyd v. Mostyn, 2 Dowl. (N. S.) 476.

<sup>14</sup> Bryan v. Wagstaff, 2 Car. & P. 486.

<sup>15</sup> Reg. v. Robinson, 5 Cox C. C. 183.

<sup>16</sup> Hughes v. Budd, 8 Dowl. 315.

<sup>17</sup> Bushnell v. Bishop Hill Colony, 28 Ill. 204.

<sup>18</sup> Mortlock v. Williams, 76 Mich. 568.

<sup>19</sup> Lawrence v. Clark, 14 M. & W. 250.

<sup>20</sup> Julius King Optical Co. v. Treat 72 Mich. 599.

as soon as he discovers his inability to procure the document, and ask for a continuance; he cannot, ordinarily, wait until the trial of the case and complain of the insufficiency of the time unless he can show that it was unreasonable under all the circumstances of the case.<sup>21</sup>

§ 1423. **Paper in court—Notice unnecessary.**—The object of the notice is to demand of the adverse party that he produce the paper desired at the trial, and to inform him that if not produced secondary evidence of the contents will be given. Under this theory it has accordingly been held that if a paper or document which is competent evidence is present in court at the trial, that nothing more could be accomplished by giving notice; therefore, in such case, if a demand is made for the surrender of the paper which is then in court, and this demand is refused, the party so demanding may then prove the contents by secondary evidence the same as if notice to produce had been given.<sup>21\*</sup>

§ 1424. **Notice—On whom served.**—It is always sufficient if the notice is served on the party, and in the absence of statutory provisions it is, perhaps, necessary that it be served on the party in person.<sup>22</sup> There must be some reason exercised in the service of the notice, and to make it sufficient the person on whom it is served must have had the means of acting upon it; for this reason it has been stated that service on a lunatic would not be sufficient;<sup>23</sup> and the same reason would apply to an infant. And the rule is that notice should be served on all proper custodians of a paper before secondary evidence of its contents can be given.<sup>24</sup> The statutes in many jurisdictions provide that service may be made upon the attorney of record; that is, upon the attorneys shown by the record in the case to be the attorneys for the party; where the statute thus provides, a service upon such attorney is as valid and legal as if served on the party.<sup>25</sup> And it was held

<sup>21</sup> Jefford v. Ringgold, 6 Ala. 544.

<sup>21</sup> \* Ferguson v. Miles, 8 Ill. 358;

Dana v. Boyd, 25 Ky. (2 J. J. Marsh.) 587; Bickley v. Commercial Bank, 39 S. Car. 281; Reynolds v. Quattlebum, 2 Rich. (S. Car.) 140; Hanselman v. Doyle, 90 Mich. 142.

<sup>22</sup> Gafford v. American, &c. Co. 77 Iowa, 736; Hughes v. Budd, 8 Dowl. 315; 2 Phillips Ev. 527.

<sup>23</sup> Reg. v. Robinson, 5 Cox C. C. 183.

<sup>24</sup> Lathrop v. Mitchell, 47 Ga. 610.

<sup>25</sup> Simington v. Kent, 8 Ala. 691;

Jefford v. Ringgold, 6 Ala. 544; Brown v. Littlefield, 7 Wend. (N. Y.) 454; Bushnell v. Bishop Hill Colony, 28 Ill. 204; Mortlock v. Williams, 76 Mich. 568; Logan v. Patterson, 1 Blackf. (Ind.) 327; Attorney General v. Le Merchant, 2 T. R. 201; Cates v. Winter, 3 T. R. 306.

that, where the attorney in a case had been changed, a notice served on the first attorney to produce papers was sufficient without service on the second, as it would be an easy thing to evade the effect of the notice by a change of attorneys on the eve of the trial.<sup>26</sup> There seems to be some authority for holding that in criminal cases the notice should be on the party himself.<sup>27</sup> It has been held that where a party goes abroad during the pendency of an action, he will be presumed to have left all papers material to the cause with his attorneys of record, and that notice on such attorneys is sufficient.<sup>28</sup> But verbal notice given to defendant's attorneys on the trial was held to be insufficient.<sup>29</sup> So a notice to an agent was held to be insufficient where he denied the custody of the papers for the reason that the agent is presumed *prima facie* to have delivered the documents desired to his principal.<sup>30</sup> This is especially so where the agent is in the position of an independent character.<sup>31</sup> It was held sufficient where it was shown that the notice to produce was served by leaving a copy with a servant at the residence of the party.<sup>32</sup>

**§ 1425. Notice—Written or parol.**—There is a diversity in the holdings of the courts as to whether or not the notice, in the absence of statutory regulations, should be in writing or by mere verbal demand. An early Illinois case held that verbal notice was insufficient, and stated the reasons thus: "A party is not bound to pay any attention to a verbal notice to produce a paper on the trial of the cause where notice is required to be served before trial. The notice should be in writing, that the party may know with certainty and precision what paper is wanted; and he shall not be compelled to rely on his memory alone for its identity."<sup>33</sup>

**§ 1426. Notice—Proof of service.**—Some satisfactory proof must be made to the court of the service of the notice to produce the document. Where the service is in person by the party, or his attorney or

<sup>26</sup> Doe d. Martin v. Martin, 1 Moo. & Rob. 242.

<sup>27</sup> Cates v. Winter, 3 T. R. 306.

<sup>28</sup> Divers v. Fulton, 8 Gill & J. (Md.) 202; Bryan v. Wagstaff, 2 C. & P. 486.

<sup>29</sup> Dade v. Aetna Ins. Co. 54 Minn. 336.

<sup>30</sup> Lathrop v. Mitchell, 47 Ga. 610.

<sup>31</sup> Evans v. Sweet, Ry. & Moo. 83.

<sup>32</sup> Hughes v. Budd, 8 Dowl. 315.

<sup>33</sup> Cummings v. McKinney, 5 Ill. 56; Hughes v. Budd, 8 Dowl. 315. But there is no reason why a verbal demand made during the trial, and especially in open court, where the party or his attorney has the paper or document desired, is not sufficient.

agent, this is not difficult. But the notice is sometimes sent by mail; in such case what evidence is necessary to establish the receipt of the letter? It has been many times held, and is now recognized as the rule, that where it is shown that a letter addressed to a person at his place of residence or business, duly stamped, is deposited in a post-office, it is *prima facie* evidence that the person to whom it was addressed received it in the ordinary course of mail. This presumption is not conclusive, but is an inference of fact, founded on the probability that the persons and officers in the mail service will perform their duties; where there is no other evidence this is regarded as sufficient *prima facie* proof of the fact of service, and requires a denial.<sup>34</sup> The evidence should show that the letter was addressed and stamped, and that the person to whom addressed received mail at such place.<sup>35</sup> The burden of proving the service of notice rests on the party asserting it.<sup>36</sup> Proof of publication of a notice may be made by parol.<sup>37</sup>

**§ 1427. Notice—Preliminary proof.**—Before a party is permitted to give secondary evidence of the contents of papers or documents he must make satisfactory proof to the court of certain matters. He must prove: (1.) That a reasonable notice

<sup>34</sup> *Munn v. Baldwin*, 6 Mass. 316; *Groton v. Lancaster*, 16 Mass. 110; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Crane v. Pratt*, 12 Gray (Mass.) 348; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Huntley v. Whittier*, 105 Mass. 391; *Russell v. Buckley*, 4 R. I. 525; *Oaks v. Weller*, 16 Vt. 63; *Dix v. Atkins*, 128 Mass. 43; *Briggs v. Hervey*, 130 Mass. 186; *Hedden v. Roberts*, 134 Mass. 38; *McDowell v. Insurance Co.* 164 Mass. 444; *Loud v. Merrill*, 45 Me. 516; *Freeman v. Morey*, 45 Me. 50; *Chase v. Surry*, 88 Me. 468; *Dade v. Aetna Ins. Co.* 54 Minn. 336; *State v. Howell*, (N. J. L.) 38 Atl. 748; *First Nat'l Bank v. McManigle*, 69 Pa. St. 156; *Jensen v. McCorkell*, 154 Pa. St. 323; *Young v. Clapp*, 147 Ill. 176; *Goodwin v. Provident &c. Asso.* 97 Iowa, 226; *Bussard v. Levering*, 6 Wheat. (U. S.) 102; *Lindenberger v. Beall*, 6 Wheat. (U. S.) 104; *Rosenthal v. Walker*, 111

U. S. 185; *Austin v. Holland*, 69 N. Y. 571; *McKay v. Myers*, 168 Mass. 312; *Callan v. Gaylord*, 3 Watts. (Pa.) 321; *Starr v. Torrey*, 2 Zab. (N. J.) 190; *Tanner v. Hughes*, 53 Pa. St. 289; *Howard v. Daly*, 61 N. Y. 362; *Saunderson v. Judge*, 2 H. Bl. 509; *Skilbeck v. Garbett*, 7 A. & E. (N. S.) 846; *MacGregor v. Keily*, 3 Exch. 794; *Spencer v. Thompson*, 6 Ir. C. L. 537; *Woodcock v. Houldsworth*, 16 M. & W. 124; *Dunlop v. Higgins*, 1 H. L. Cas. 381; 1 *Greenleaf Ev.* § 40; 1 *Taylor Ev.* § 147.

<sup>35</sup> *Briggs v. Hervey*, 130 Mass. 186; *Hedden v. Roberts*, 134 Mass. 38; *McKay v. Myers*, 168 Mass. 312.

<sup>36</sup> *Crane v. Pratt*, 12 Gray (Mass.) 348; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Huntley v. Whittier*, 105 Mass. 391.

<sup>37</sup> *Lingle v. City of Chicago*, 172 Ill. 170, 50 N. E. 192.

had been given the adverse party to produce the document at the trial; (2.) he must show that the party has refused to produce it; (3.) he must show that the party on whom he served the notice had possession or control of the instrument at the time the notice was so served upon him.

§ 1428. **Proof of notice—Opportunity to produce.**—In making the preliminary proof as to the sufficiency of the notice and the failure to produce as the basis for the introduction of secondary evidence, the court should be satisfied that a reasonable opportunity had been afforded the adverse party to produce the papers or documents desired before the secondary evidence can be admitted.<sup>38</sup> And where it appeared from such preliminary evidence that a document desired was in the possession of one of the parties who resided out of the state, and no effort either by deposition or notice to produce was made to obtain possession of it, the court very properly held that a sufficient foundation had not been laid for the introduction of secondary evidence. The fact that the person to whose possession the document was last traced resided out of the state, under this practice, did not excuse a diligent effort to procure it.<sup>39</sup> But where the preliminary proof shows that the writing is in the possession of the adverse party, and that sufficient notice has been given to produce it, and he has failed to do so, and gives no reason for his non-compliance, it has been held sufficient to justify the introduction of secondary evidence of the contents.<sup>40</sup> It must appear that the notice was served a sufficient length of time before the trial to enable the adverse party to produce the papers or documents required, or to make due search for them.<sup>41</sup>

§ 1429. **Preliminary proof—Discretion of court.**—The preliminary proof of the acts regarded as necessarily precedent to the right to introduce secondary evidence of the contents of papers and documents is addressed to the court. This evidence must be sufficient to satisfy the court that a reasonable notice has been served, and that the party

<sup>38</sup> *Divens v. Fulton*, 8 Gill & J. 208; *Glenn v. Rogers*, 3 Md. 312; *Downer v. Button*, 26 N. H. 338.

<sup>39</sup> *Wood v. Cullen*, 13 Minn. 394; *Turner v. Yates*, 16 How. (U. S.) 26. See §§ 1421, 1444.

<sup>40</sup> *Spears v. Lawrence*, 10 Wash. (U. S.) 368; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Smith v. Reed*,

7 Ind. 242; *Mumford v. Thomas*, 10 Ind. 167; *Williams v. Jones*, 12 Ind. 561; *Duringer v. Moschino*, 93 Ind. 495; *Newton v. Donnelly*, 9 Ind. App. 359; *Woods Practice Ev.* §§ 9 & 10; 1 *Greenleaf Ev.* 87.

<sup>41</sup> *Cleveland, &c. R. Co. v. Newlin*, 74 Ill. App. 638. See ante § 1419.



has refused to comply with the notice. These questions are for the court, and are addressed to its reasonable or sound discretion.<sup>42</sup> And the length of time given by the notice in which to produce the document must be considered in view of what appeared to be the situation of the parties and the place where the documents were kept, and these are largely within the court's discretion.<sup>43</sup> It has been held that the notice to produce may be proved by parol.<sup>44</sup>

**§ 1430. Possession of document.**—The preliminary proof must show that the party on whom the notice was served had possession of the document. But it is not necessary that the proof show that the instrument was in the actual possession of the party. The rule on this subject is stated by an English court as follows: "In order to let in secondary evidence the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be, if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it as would entitle him not merely to inspect but to retain."<sup>45</sup> And where a statute provided for the introduction of secondary evidence upon

"Burke v. Table Mountain, &c. Co. 12 Cal. 403; Robinson v. Ferry, 11 Conn. 460; Cummings v. McKinney, 5 Ill. 57; Brock v. Des Moines. Ins. Co. 106 Iowa, 30, 75 N. W. 683; Page v. Page, 15 Pick. (Mass.) 368; Dana v. Kemble, 19 Pick. (Mass.) 112; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 300; Life, &c. Ins. Co. v. Mechanics', &c. Ins. Co. 7 Wend. (N. Y.) 31; Hammond v. Hopping, 13 Wend. (N. Y.) 505; Foot v. Bentley, 44 N. Y. 166; Sun Ins. Co. v. Earle, 29 Mich. 406; Moulton v. Mason, 21 Mich. 364; Woods v. Gassett, 11 N. H. 442; Bosworth v. Clark, 62 Ga. 286; Allen v. Blunt, 2 Wood. & M. 121; Boyle v. Wiseman, 33 E. L. & E. 393; Laxton v. Reynolds, 28 E. L. & E. 553; George v. Thompson, 4 Dowl. 656; Lloyd v. Mostyn, 2 Dowl. (N. S.) 476; Hervey v. Mitchell, 2 Moo. & R. 366.

<sup>43</sup> Price v. Kohn, 99 Ill. App. 115;

Downer v. Button, 26 N. H. 338; Gorham v. Gale, 7 Cow. (N. Y.) 739; Jack v. Rowland, 98 Ill. App. 352; Glenn v. Rogers, 3 Md. 312; Jacques v. Collins, 2 Blatchf. (U. S.) 23; Reynolds v. Quattlebum, 2 Rich. (S. Car.) 140; Shreve v. Dulaney, 1 Cranch (U. S.) C. C. 499; Jefford v. Ringgold, 6 Ala. 544; Cody v. Hough, 20 Ill. 43; Divers v. Fulton, 8 Gill & J. 202; Reg v. Hankins, 2 C. & K. 823; Reg v. Kitson, Pearce C. C. 87; George v. Thompson, 4 Dowl. 656; Atkins v. Meredith, 4 Dowl. 658; Meyrick v. Woods, C. & Marsh. 452; Reg. v. Hamp, 6 Cox C. C. 167; Taylor Ev. § 415.

<sup>44</sup> Turner v. Wilson, 3 Cai. (N. Y.) 174; Johnson v. Haight, 13 Johns. (N. Y.) 470.

<sup>45</sup> Parry v. May, 1 Moo. & Rob. 279; Irwin v. Lever, 2 F. & F. 296; Dana v. Kemble, 19 Pick. (Mass.) 112.

proof that the original was not within the power of the person offering it, the expression "not within the power" was held to mean that it was not within the control or possession of the party wishing to use the copy; that is, not in the possession of the party, his agent, servant, or bailee, or other person under his control.<sup>46</sup>

§ 1431. **Production—Proof of execution not required.**—The effect of the production of papers or documents to be used as evidence is that, where any papers or documents are produced on notice from the adverse party, and where it appears that the party producing them is either a party to the instrument or claims under it, then the production itself dispenses with any proof of the execution of the instrument, and for the purpose of its admissibility it stands as approved.<sup>47</sup>

§ 1432. **Notice—Description of document.**—The notice to produce must sufficiently describe and identify the papers, books or documents to be produced and used on the trial; but the description of such documents in this notice, under the authorities, is not required to be so particular and specific as in the case of notice to produce for discovery or inspection. While no general rule can be laid down in either case as to what the notice shall contain, it seems to be settled that it is not necessary to describe minutely as to dates, contents, parties, and the like in order to specify the precise documents intended. And it seems to be settled also that no misstatement or inaccuracy in the notice will be deemed material, if it be not calculated to mislead the opponent.<sup>48</sup> It is impossible that literal accuracy should be expected in describing papers in the possession of the adverse party; hence it is held that such description is sufficient as will apprise a person of ordinary intelligence of the document desired.<sup>49</sup> So it has been held that a notice is sufficient if enough is stated in the notice to lead the party to believe that a particular instrument is required.<sup>50</sup> And a notice to produce "all letters written by the plaintiff to the defendant relating to the matters in dispute in the action" was held to be sufficient.<sup>51</sup>

<sup>46</sup> *Gilbert v. Boyd*, 25 Mo. 27; *Barton v. Murrain*, 27 Mo. 235.

<sup>47</sup> *Williams v. Keyser*, 11 Fla. 234; *Rogers v. Hoskins*, 15 Ga. 270; *Herring v. Rogers*, 30 Ga. 615; *Betts v. Badger*, 12 Johns. (N. Y.) 223; *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158; *Rhoades v. Selin*, 4 Wash. C. C. 715.

<sup>48</sup> *Justice v. Elston*, 1 F. & F. 258; *Graham v. Oldis*, 1 F. & F. 262.

<sup>49</sup> *Burke v. Table Mt. &c. Co.* 12 Cal. 403.

<sup>50</sup> *Rogers v. Custance*, 2 M. & Rob. 181.

<sup>51</sup> *Jacob v. Lee*, 2 M. & Rob. 33; *Conybeare v. Farries*, 5 L. R. Ex. 16; *Morris v. Hauser*, 2 M. & Rob.

§ 1433. **Notice—Examples of sufficient description.**—A notice was held sufficient which required the defendant to produce “every and all letters written by the said plaintiff to the said defendant, relating to the matters in dispute in this action,” on the ground that the notice mentioned the names of the parties by whom and to whom the letters were addressed.<sup>52</sup> So a notice to produce “all accounts relating to the matters in question in this cause” was sufficient without specifying dates.<sup>53</sup> In an action on an insurance policy a notice sent by mail, dated at the place of the sitting of the court and received in due course of mail by the defendant’s attorneys, and which notified them “to produce at the coming trial of the cases [giving title] in our Superior Court the present term here, all proofs of loss, written schedules, letters, and communications or written memoranda of every kind received by the above-named company’s defendant, or by you as their attorneys, each and all of them, received from the said plaintiff or from his attorneys at any time since the fire mentioned in the several declarations in said suits,” identified the letters as received within the time specified, and that they were sufficiently described by the subject to which they related.<sup>54</sup> And a notice to produce “all papers appertaining to the co-partnership” was held sufficient to call for the production of a deed relating to the firm business.<sup>55</sup>

§ 1434. **Notice—Examples of insufficient description.**—Notice “to produce letters and copies of letters, also all books relating to this cause,” was held insufficient to require the production of a letter written several years before, and it was held that secondary evidence could not be given on failure to produce it.<sup>56</sup> And a notice was held to be too general which stated “all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered.”<sup>57</sup> So, a notice given to produce “the letters hereunder specified, and all letters relating to the matter in question,” was held insufficient to require the production of more than the three letters particularly specified in the notice.<sup>58</sup>

392; *France v. Lucy*, Ry. & M. 341;  
*Bemis v. Charles*, 1 Metc. (Mass.)  
 440; *Taylor Ev.* § 413.

<sup>52</sup> *Jacob v. Lee*, 2 Moo. & Rob. 33.

<sup>53</sup> *Rogers v. Custance*, 2 Moo. &  
 Rob. 179.

<sup>54</sup> *McDowell v. Aetna Ins. Co.* 164  
 Mass. 444, 41 N. E. 665; *Vasse v.*  
*Miffin*, 4 Wash. C. C. 519; *Bloede*

*Co. v. Bancroft, &c. Co.* 98 Fed.  
 175, 188.

<sup>55</sup> *Jones v. Parker*, 20 N. H. 31;  
*Bogart v. Brown*, 5 Pick. (Mass.)

18.

<sup>56</sup> *Jones v. Edwards*, 1 Exch. 139.

<sup>57</sup> *France v. Lucy*, Ry. & M. 341.

<sup>58</sup> *Smith v. Sandeman*, 2 Cox (U.  
 S.) C. C. 239.

§ 1435. **Refusal to produce—Party bound.**—Where sufficient notice has been given to the adverse party to produce papers or documents, and he fails to do so, under rules already stated, after making the proper preliminary proofs, the party serving the notice may then give secondary evidence of the contents of the papers or documents which his adversary has refused to produce. After such secondary evidence has been given, the party having possession of such papers or documents cannot then introduce them in evidence; he is bound by the secondary evidence already given. The rule, with its reasons, is thus aptly stated by a New York court: "There can be no doubt but that the rule of evidence, relied upon by the plaintiff, respecting the effects of omitting to produce the books or papers upon the trial, when required to do so by the notice of the opposite party, is well settled, and besides that, it is just and wholesome, and in all proper cases should be observed and applied. The party failing, after notice, to produce books and papers in his possession or under his control, is not entitled to the favorable consideration of the tribunal before which the trial may be proceeding. As to that part of his cause of action or defense which may be dependent upon their contents; and no injustice is done to him after he has voluntarily withheld them when they were required by his adversary, by excluding them from the case upon his offer to introduce them. It is but a just consequence of his own misconduct for the needless embarrassment occasioned to his adversary. And the rule of evidence existing on that subject should be enforced against the defaulting party."<sup>59</sup> This rule has been carried to the extent of holding that, after proof of the contents of the document by secondary evidence, the adverse party will not be permitted to introduce parol evidence to show that such document was different from that stated by the witness of the other party; it would only be proper to show that he had never executed such an instrument,<sup>60</sup> and

<sup>59</sup> Tyng v. United States, &c. Co. 1 Hun (N. Y.) 161; Mather v. Eureka, &c. Co. 118 N. Y. 629; McGuinness v. School Dist. No. 10, 54 Minn. 499; Joannes v. Bennett, 5 Allen (Mass.) 169; Stone v. Sanborn, 104 Mass. 319; Doon v. Denaher, 113 Mass. 151; Gage v. Campbell, 131 Mass. 566; Neally v. Greenough, 25 N. H. 325; Doe d. Thompson v. Hodgson, 12 A. & E.

135; Doe d. Higgs v. Cockell, 6 Car. & P. 525; Lewis v. Hartley, 7 Car. & P. 405; Edmonds v. Challis, 6 D. & L. 581, 62 E. C. L. 413; Collins v. Gashon, 2 F. & F. 47; Jackson v. Allen, 3 Stark. 74; Doe v. Wainwright, 5 A. & E. 520; 2 Phillips Ev. 447; 1 Wharton Ev. § 157.

<sup>60</sup> Bogart v. Brown, 5 Pick. (Mass.) 18; Flemming v. Lawless, 56 N. J. Eq. 138, 38 Atl. 864.

this question is for the jury.<sup>61</sup> But the rule does not apply where the action itself is based on a lost instrument, and in such case it has been held that the defendant may produce and give in evidence the note alleged to be lost.<sup>62</sup>

**§ 1436. Rule denied.**—The Michigan Supreme Court has very emphatically denied both the doctrine and the application of the rule stated in the preceding section. The following language of Mr. Justice Campbell is very strong and emphatic: “The refusal, after reasonable notice, to produce a document in his possession, which the adverse party is entitled to introduce in evidence, authorizes proof by secondary evidence. But it does not dispense with such proof as is attainable, and does not allow the tenor of the instrument to be made out by anything less than satisfactory evidence of all that is essential. There is no rule which prevents the contradiction of such secondary evidence, or which will allow a document to be conclusively proved by anything that a party may see fit to affirm to be a copy. Dispensing with primary evidence only changes the degree of evidence required, but in no way allows a case to be made out without proof, or prevents counter proof. The rule enforced in the present case is equivalent to excluding all testimony for the defense on a principal issue. This would be an arbitrary and monstrous doctrine. It seems to have been rested on the supposed rule that a party who refuses, when requested, to produce a document in his possession, shall not afterwards be allowed to produce it to contradict the secondary proofs of his adversary. That, however, was not attempted here. There was no admission that the paper in question was in Moulton’s possession, and the questions put to him on the defense did not call for its production. They were put in such a way as to draw out parol evidence as readily as written. But we do not perceive any very sound reason why the document itself should be excluded, if he had it. There are, indeed, some cases, which were cited on the argument, which seem to hold that a party declining to produce a document, when called for under a proper notice, is estopped from producing it afterwards. There is no authority for such exclusion where it relates to his own case, even where not produced when called for by his adversary. But this doctrine of estoppel has not found its way very generally into the text books, and cannot be said to be among the old or established principles of the law. It

<sup>61</sup> *Stowe v. Querner*, L. R. 5 Exch. 155.

<sup>62</sup> *Helzer v. Helzer*, 187 Pa. St. 243, 41 Atl. 40.

is not a rule calculated to further the eliciting of the truth. It is simply an attempt to punish one party by allowing his adversary to recover what does not belong to him, or to defend unjustly against a proper claim. Any rule, which rejects certain proof for uncertain, deserves very little respect."<sup>63</sup>

§ 1437. **Failure to produce—Effect.**—It has already been suggested that the effect of the failure to comply with the notice and produce the document will admit secondary evidence of its contents;<sup>64</sup> and that the party is bound by such refusal.<sup>65</sup> But there are other matters which may be properly considered if the adverse party fails to produce the instrument required on notice. Thus the party so in default will not be heard to complain if the secondary evidence offered is vague and indistinct, and under such circumstances a jury will be justified in finding in favor of the interpretation of the instrument or document most unfavorable to the party so refusing, for the reason that the correct interpretation could be reached by producing the document.<sup>66</sup> And under such circumstances the due execution of the document refused to be produced may be inferred.<sup>67</sup> Where a notice has been served on a party to produce original papers, or a certain copy would be used, and the party made no effort to produce the original, he could not complain that the copy offered was not correct.<sup>68</sup> And where a copy of an agreement was attached to the notice the party having the original in court could not insist that his adversary was bound by the

<sup>63</sup> *Moulton v. Mason*, 21 Mich. 364; 3 Phillips Ev. (Edward's Ed.) 535.

The distinguished judge who wrote the opinion in this Michigan case was certainly mistaken when he asserted that "there is no authority for such exclusion where it relates to his own case," and the very authority he cites (2 Phillips Ev.) does not sustain him. It seems that all the cases where the rule is stated, very clearly show that the party is bound both on cross-examination and on making out his own case. And in one English case, cited in the preceding section, it was expressly stated that "where a party refuses to pro-

duce a document after notice, and secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case." *Doe d. Thompson v. Hodgson*, 2 Moo. & Rob. 283.

<sup>64</sup> See § 1417.

<sup>65</sup> See § 1435.

<sup>66</sup> *Tatham v. Drummond*, 33 L. J. Ch. 438; *McGuinness v. School Dist. No. 10*, 39 Minn. 499; *Tuckey v. Henderson*, 33 Beav. 174; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Wood Prac. Ev.* § 12.

<sup>67</sup> *Benjamin v. Ellinger*, 80 Ky. 472. See § 1431.

<sup>68</sup> *Gafford v. American, &c. Co.* 77 Iowa, 736.

copy.<sup>69</sup> The party who withholds documents or papers cannot insist on their production, and cannot be heard to complain of the secondary evidence offered.<sup>70</sup> So the withholding of documents after notice has been held proper ground for comment by counsel in argument to the jury.<sup>71</sup>

**§ 1438. Notice—When not necessary.**—There are certain exceptions to the general rule requiring a party to serve notice on his adversary for the production of papers and documents to be used at the trial of a case. Secondary evidence of the contents of documents may be given in certain cases without notice to produce the originals. There are, perhaps, three noted exceptions to the rule: (1.) where a duplicate original is offered; (2.) where the instrument to be proved is itself a notice; (3.) where the nature of the action is such as to give the opposite party notice that he is charged with the custody of the original paper or document.<sup>72</sup> The rule on this subject, laid down by Mr. Stephen and approved by the Supreme Court of Maine, is as follows: "Notice is not required in order to render secondary evidence admissible: (1.) when the document to be proved is itself a notice; (2.) when the action is founded on the assumption that the document is in the possession or power of the adverse party and requires its production; (3.) when it appears, or is proved, that the adverse party has obtained possession of the original from a person subpoenaed to produce it; (4) when the adverse party or his agent has the original in court."<sup>73</sup>

**§ 1439. Duplicate originals—Notice unnecessary.**—The first exception to the rule requiring notice to produce is found where the instrument relied upon was originally executed in duplicate. Where contracts or instruments are executed in duplicate, each is supposed to be an exact copy of the other, and where each party to the instrument has a copy no good reason exists for requiring an adverse party to produce his copy when the party giving the notice has in his possession a perfect duplicate. Hence the reason for the exception to the general rule is obvious.<sup>74</sup> This exception to the general rule was stated in an early United States case as follows: "But in examining the numerous

<sup>69</sup> *Bogart v. Brown*, 5 Pick. (Mass.) 18. See 6 Me. 170 [200].

<sup>70</sup> *Cooper v. Granberry*, 33 Miss. 117 (4 Geo.).

<sup>71</sup> *Emerson v. Fisk*, 6 Me. 200.

<sup>72</sup> 1 *Greenleaf Ev.* § 561; *Collins v. Treweek*, 6 Barn. & C. 394.

<sup>73</sup> *Stephen Ev.* art. 68; *Knowles v. Scribner*, 57 Me. 495; *Clark v. Bradstreet*, 80 Me. 454.

<sup>74</sup> *Cleveland, &c. R. Co. v. Perkins*, 17 Mich. 296; *Barr v. Armstrong*, 56 Mo. 577.

adjudged cases to be found in the books in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered had not been made by the party against whom it was admitted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy is admitted to be wholly in the defendant's handwriting. From the nature of the transaction, he was entitled to, and must be presumed to have, the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession by the defendant's own act; and by making and delivering it to the plaintiff the defendant consents that it shall be considered genuine and true. We think that, under such circumstances, this case forms a just exception to the general rule, and that it is not competent for the defendant below to allege, against his own acts and admissions, that this paper does not, nor may not, contain all the verity and certainty of the original."<sup>75</sup> The rule has been otherwise stated as follows: "Where a contract is executed by the parties thereto in duplicate or triplicate form, the parts are denominated duplicate or triplicate originals, and they are all primary evidence, the one as much so as the other. It does not require, in order to introduce one of the duplicates, that notice should be given to produce the other."<sup>76</sup>

§ 1440. **Instrument to be proved is a notice.**—Under the second exception to the rule, where the instrument itself that is to be proved is a notice, then no notice for its production for use at the trial is necessary. Thus, it is said: "Every written notice is for the best of reasons to be proved by a duplicate original, for if it were otherwise the notice to produce the original could be proved only in the same way as the original itself, and thus a fresh necessity would be constantly arising ad infinitum to prove notice of the preceding notice."<sup>77</sup> This

<sup>75</sup> Carroll v. Peake, 1 Pet. (U. S.) 18.

<sup>76</sup> Totten v. Bucy, 57 Md. 446; Hubbard v. Russell, 24 Barb. (N. Y.) 404; Jory v. Orchard, 2 Bos. & P. 39; Philipson v. Chase, 2 Camp. 110; Burleigh v. Stibbs, 5 T. R. 465; Roe d. West v. Davis, 7 East, 363; Paul v. Meek, 2 Y. & J. 116; Houghton v. Koenig, 18 C. B. 235; Munn v. Godbold, 3 Bing. N. Cas. 292; Hawes v. Forster, 1

Moo. & Rob. 368; 1 Taylor Ev. p. 425, § 396; 1 Greenleaf Ev. § 558.

<sup>77</sup> Eisenhart v. Slaymaker, 14 S. & R. 153; Morrow v. Commonwealth, 48 Pa. St. 305; Faribault v. Ely, 13 N. Car. 67; State v. Credle, 91 N. Car. 640; Jones v. Call, 93 N. Car. 170; McMillan v. Boxley, 112 N. Car. 578; Leavitt v. Simes, 3 N. H. 14; Loranger v. Jardine, 56 Mich. 518; Hughes v. Hays, 4 Mc. 209; Christy v. Horne, 24 Mo. 242;



rule applies to notice of dishonor and protest.<sup>78</sup> And also to a notice to quit.<sup>79</sup>

**§ 1441. Production required from nature of action.**—The third exception to the rule requiring notice to produce is found in cases where the nature of the action or the substance of the pleadings is such as to give the opposite party notice that he is charged with the custody of the original papers desired. A New York case states the rule as follows: "Where the nature of the proceedings or the form of action or pleading gives the opposite party notice to be prepared to produce a writing or instrument, if necessary, to falsify the plaintiff's evidence, no other notice to produce it is necessary. The defendant must have known, from the declaration in this case, that the contents of the execution in his possession would come in question; that the plaintiff could not recover without proving it. He was, therefore, bound to have it in court, ready to be produced, or suffer parol evidence of its contents to be given."<sup>80</sup> And where the party is bound to know, from the nature of the action, that he is charged with the possession of the

Barr v. Armstrong, 56 Mo. 577; Brown v. Booth, 66 Ill. 419; Gethin v. Walker, 59 Cal. 502; Queen v. Mortlock, 7 Q. B. (53 E. C. L.) 459.

<sup>78</sup> Faribault v. Ely, 13 N. Car. 67; Johnson v. Haight, 13 Johns. (N. Y.) 470; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Atwell v. Grant, 11 Md. 101; Central Bank v. Allen, 16 Me. 41; Taylor v. Bank, &c. 7 T. B. Mon. (Ky.) 576; Leavitt v. Simes, 3 N. H. 14; Kline v. Beaumont, 3 B. & B. 288; Collins v. Treweek, 6 B. & C. 394; Ackland v. Pearce, 2 Campb. 599; Swain v. Lewis, 2 C. M. & R. 261.

<sup>79</sup> Doe v. Somerton, 7 Q. B. (53 E. C. L.) 58.

A few cases hold that notice to produce must be given even where the contents of a notice are to be proved. But some of these are under peculiar circumstances which rather support than deny the rule. Jones v. Robinson, 11 Ark. 504; Frank v. Longstreet, &c. Co. 44 Ga. 178; Rutland, &c. R. Co. v. Thrall,

35 Vt. 536; Langdon v. Hulls, 5 Esp. 156; Columbus, &c. R. Co. v. Tillman, 79 Ga. 607; Robinson v. Brown, 3 C. B. (54 E. C. L.) 754.

<sup>80</sup> Story v. Patten, 3 Wend. (N. Y.) 486; Hammond v. Hopping, 13 Wend. 505; Mauri v. Hefferman, 13 Johns. (N. Y.) 57; People v. Holbrook, 13 Johns. (N. Y.) 90; Hardin v. Kretsinger, 17 Johns. (N. Y.) 293; Spencer v. Boardman, 118 Ill. 553; State v. Mayberry, 48 Me. 218; Overlock v. Hall, 81 Me. 348; Rose v. Lewis, 10 Mich. 482; Dana v. Conant, 30 Vt. 246; Hart v. Robinson, 5 Mo. 11; Howell v. Huyck, 2 Abb. Dec. (N. Y.) 423; Commonwealth v. Messinger, 1 Bin. (Pa.) 273; Blevins v. Pope, 7 Ala. 371; McGinnis v. State, 24 Ind. 500; Hotchkiss v. Mosher, 48 N. Y. 478; 1 Greenleaf, § 561; How v. Hall, 14 East 274; Scott v. Jones, 4 Taunt. 865; Whitehead v. Scott, 1 M. & R. 2; Benher v. Jarratt, 3 B. & P. 143; Jolley v. Taylor, 1 Campb. 143.

document and will be required to produce it at the trial, notice is unnecessary.<sup>81</sup> This rule is especially applicable in actions of trover for the recovery of a written instrument;<sup>82</sup> and where a party has fraudulently obtained possession of an instrument belonging to the opposite party notice to produce is unnecessary.<sup>83</sup> The rule also applies in prosecutions for larceny of written instrument,<sup>84</sup> as well as in prosecutions for forgery.<sup>85</sup> Notice to produce is not necessary when the adverse party asserts that the document is not in his possession, and has no knowledge of its existence.<sup>86</sup>

**§ 1442. Collateral matters—Production unnecessary.**—Another exception to the general rule requiring notice to an adverse party to produce papers and documents in order to prove the contents by secondary evidence arises in cases where the contents of such papers or documents are collaterally involved and are under the subject of the direct issue in the case. The rule is thus stated: "The general rule has no application where the written instrument is merely collateral to the issue; as where the parol evidence relates to matters distinct from the instrument of writing, although the same fact could be proved or disproved by the writing."<sup>87</sup> In such cases the admissibility of the secondary

<sup>81</sup> *Ross v. Bruce*, 1 Day (Conn.) 100; *Kellar v. Savage*, 20 Me. 199; *McClean v. Hertzog*, 6 S. & R. (Pa.) 154; *Read v. Gamble*, 10 A. & E. 597; *Colling v. Treweek*, 6 B. & C. 398; *Scott v. Jones*, 4 Taunt. 865; *Hardin v. Kretsinger*, 17 Johns. (N. Y.) 293; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

<sup>82</sup> *State v. Mayberry*, 48 Me. 218; *Rose v. Lewis*, 10 Mich. 482; *McClean v. Hertzog*, 6 S. & R. 154; *Bissell v. Drake*, 19 Johns. (N. Y.) 66; *Blevins v. Pope*, 7 Ala. 371; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East 274; *Wood v. Strickland*, 2 Meriv. 461; *Hall v. Ball*, 2 M. & Gr. 241.

<sup>83</sup> *Gray v. Kernahan*, 2 Const. Ct. (S. Car.) 65; *State v. Mayberry*, 48 Me. 218; *Davis v. Spooner*, 3 Pick. (Mass.) 284; *Commonwealth v. Suell*, 3 Mass. 82; *People v. Hol-*

*brook*, 13 Johns. (N. Y.) 90; *Read v. Gamble*, 10 A. & E. 597; *Leeds v. Cook*, 4 Esp. 256; *Doe v. Ries*, 7 Bing. 724; *Edington v. Nixon*, 7 Bing. N. Cas. 324; 1 *Greenleaf Ev.* § 597; 2 *Phillips Ev.* 225.

<sup>84</sup> *Commonwealth v. Messinger*, 1 Bin. (Pa.) 273; *People v. Holbrook*, 13 Johns. (N. Y.) 90; *McGinnis v. State*, 24 Ind. 500; *Rex v. Aikles*, 1 Leach 436; *Howe v. Hall*, 14 East 274; *Benher v. Jarratt*, 3 B. & P. 143; *Jolley v. Taylor*, 1 Camp. 143; *Wood v. Strickland*, 2 Meriv. 461. But see *Rex v. Harworth*, 4 C. & P. 254 [502].

<sup>85</sup> *Ross v. Bruce*, 1 Day (Conn.) 100. But see *State v. Flanders*, 118 Mo. 227.

<sup>86</sup> *Roberts v. Spencer*, 123 Mass. 397; *Littleton v. Clayton*, 77 Ala. 571; *Safe, &c. Co. v. Turner* (Md.), 55 Atl. 1023.

<sup>87</sup> *Woods Pr. Ev.* 4; *Coonrod v.*

evidence depends on whether the parol evidence is as near the thing to which the witness testifies as the written evidence.<sup>88</sup> Under this exception to the general rule it has been held that the witness may testify to the declarations and admissions of a party although they involved the contents of a written instrument.<sup>89</sup> For like reasons it was held competent to prove by parol to whom a deed or mortgage ran.<sup>90</sup> It is also held that payment may be proved by parol although a written receipt has been given.<sup>91</sup> So proof of sale may be made by parol, notwithstanding the fact that the contract of sale was in writing and was admissible in evidence.<sup>92</sup> So parol proof of occupancy is proper where the holding is under a written lease.<sup>93</sup>

**§ 1443. Document in third person's possession.**—The fact that the document is not in the possession of the adverse party will not justify the introduction of secondary evidence to prove its contents; but if it is known to be in the possession of a third person who is within the jurisdiction of the court, he must be required to attend the trial, and to bring with him the document or papers required, and his attendance may be compelled by a subpoena duces tecum. The court has power to compel third persons not parties to the action to produce papers and documents which have been entrusted to them, and it has been held that the fact that a court abuses its discretion in this respect furnishes no ground for a reversal of the case.<sup>94</sup> It is the duty of a witness to obey the subpoena and bring with him to the trial the paper or document required; he cannot judge for himself in advance whether or not the document is proper, or whether or not he should obey the subpoena; the validity of any excuse he may have must be passed upon by the court and not the witness.<sup>95</sup> Where, for any reason, the court will not require the production of the papers by a subpoena duces tecum, nor

Madden, 126 Ind. 197; Hewitt v. State, 121 Ind. 245; Street v. Nelson, 67 Ala. 504; Whiteside v. Hoskins, 20 Mont. 361; Westfield Cigar Co. v. Insurance Companies, 169 Mass. 382; Hayward, &c. Co. v. Duncklee, 30 Vt. 29.

<sup>88</sup> Wharton Ev. § 77; Coonrod v. Madden, 126 Ind. 197; Hewitt v. State, 121 Ind. 245. See § 1264.

<sup>89</sup> Cramer v. Shriner, 18 Md. 140.

<sup>90</sup> Clemens v. Conrad, 19 Mich. 170; Showman v. Lee, 86 Mich. 556.

<sup>91</sup> Chambers v. Hunt, 22 N. J. L.

<sup>92</sup> Sirrine v. Briggs, 31 Mich. 443; Gallagher v. London Assur. Corp. (Pa.) 24 Atl. 115.

<sup>93</sup> Strother v. Barr, 5 Bing. N. Cas. 136; King v. Inhabitants, &c. 7 Barn. & C. 611.

<sup>94</sup> Dickerson v. Talbot, 14 B. Mon. (Ky.) 60; Chaplain v. Briscoe, 5 Sm. & M. (Miss.) 198; Rucker v. McNeely, 4 Blackf. (Ind.) 123; Foster v. State, 88 Ala. 182; 3 Starkie Ev. 1721.

<sup>95</sup> Chaplain v. Briscoe, 5 Sm. & M. (Miss.) 198.

permit their introduction in evidence when produced, the papers may be regarded so far inaccessible as to render secondary evidence of their contents admissible; and this is especially true where the witness is incompetent to testify.<sup>96</sup> But a witness will not be permitted to testify to the contents of papers or documents belonging to him and in his possession without producing them. In England it has been held that a failure by the witness to produce documents or papers did not justify the introduction of secondary evidence.<sup>97</sup>

**§ 1444. Production—Third person out of court's jurisdiction.**—The question of the admissibility of secondary evidence to prove the contents of papers and documents that are beyond the jurisdiction of the court is more fully discussed elsewhere.<sup>98</sup> The question here to be discussed relates more to the production of papers and documents in the hands of third persons who are beyond the court's jurisdiction. Over such persons the court has no power by subpoena duces tecum, or otherwise. Nothing could be accomplished by compelling a party to take the deposition of such person for the reason that the witness could not be compelled to attach copies of such papers or documents to his deposition. Hence the rule is that where it is shown that papers or documents are in the hands of third persons who are beyond the jurisdiction of the court, it is sufficient ground to prove the contents by secondary evidence; but it should be made to appear that the adverse party has no power over such papers or documents, for if he should have, then notice to produce is necessary.<sup>99</sup> Some of the courts of England have held that it is no ground for the admission of secondary evidence that the person who has possession of papers and docu-

<sup>96</sup> *Stanford v. Murphy*, 63 Ga. 410; *Wilkerson v. State*, 91 Ga. 729; *Farmer v. State*, 100 Ga. 41.

<sup>97</sup> *Richards v. Stewart*, 2 Day (Conn.) 328y; *Queen v. Inhabitants*, 75 E. C. L. (2 E. & B.) 940; *Jesus College v. Gibbs*, 1 Y. & C. 145.

<sup>98</sup> See §§ 210, 211, 1469-1471.

<sup>99</sup> *Bozeman v. Browning*, 31 Ark. 364; *Gordon v. Searing*, 8 Cal. 49; *Binney v. Russell*, 109 Mass. 55; *Manning v. Maroney*, 87 Ala. 567; *Burton v. Driggs*, 20 Wall. (U. S.) 134; *Zellerbach v. Allenberg*, 99 Cal. 57; *Pensacola R. Co. v. Schaffer*, 76

Ala. 233; *Townsend v. Atwater*, 5 Day (Conn.) 298; *Shepard v. Giddings*, 22 Conn. 232; *Mitchell v. Jacobs*, 17 Ill. 235; *Fisher v. Greene*, 95 Ill. 94; *Waller v. Cralle*, 47 Ky. (8 B. Mon.) 11; *Bullis v. Easton*, 96 Iowa, 513; *Knickerbocker v. Wilcox*, 83 Mich. 200; *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Combs v. Breathitt County (Ky.)*, 46 S. W. 505; *Sayles v. Bradley, & Co. (Ky.)* 49 S. W. 209; *Miller v. McKinnon*, 103 Ga. 553, 29 S. E. 467.

ments is beyond the jurisdiction of the court, and that he has refused to deliver them up on request.<sup>100</sup>

§ 1445. **Production—Effect as evidence for party producing.**—The effect of the production of papers or documents as evidence for the party so producing them, pursuant to notice, has given rise to much discussion and great contrariety of opinions by courts and law writers. From the authorities cited hereafter the following diverse rules have been stated: (1.) the production of documents pursuant to notice renders such documents competent evidence on behalf of the party producing them; (2.) the mere production gives the party producing them no right to use them in his own behalf; (3.) where documents are produced pursuant to notice, and inspected by the party giving the notice, they are thereby rendered competent evidence for the party producing them; (4.) the use of documents produced on notice gives the party producing no rights except as to matters immediately and necessarily connected with the items or matters used by the noticing party; (5.) the production of documents on notice and their use by the noticing party gives the producing party no rights whatever that he does not have independent of the production.<sup>101</sup> The English rule was stated by Lord Kenyon in one case to be “that if the counsel on one side called for the other’s books, and made no use of them, that it was only a matter of observation to the counsel on the other side that the entries there were in favor of his client, but did not entitle him to use them as evidence to be offered to the jury.”<sup>102</sup> In a later English case the rule is thus given in the syllabus: “If the plaintiff’s counsel calls on the other side to produce a paper, and reads it, he is bound to give it in evidence if it is material to the issue; but if it is not material the plaintiff’s counsel need not give it in evidence, though required by the other side to do so.”<sup>103</sup> A still later English case states the rule as follows: “If, during the cross-examination of one of the plaintiff’s witnesses, the defendant’s counsel, under a notice to produce, called for a book which the plaintiff’s counsel produced, the defendant’s counsel, if he looks over the book, so as to see the contents of several pages of it, will be bound to put it in as his evidence.”<sup>104</sup>

<sup>100</sup> *Boyle v. Wiseman*, 10 Exch. 647.

<sup>101</sup> 3 *Phillips Ev.* (4th Am. Ed.) 1191; *Commonwealth v. Davidson*, 1 *Cush. (Mass.)* 33.

<sup>102</sup> *Sayer v. Kitchen*, 1 *Esp.* 209;

*Johnson v. Gilson*, 4 *Esp.* 21; *Wharham v. Routledge*, 5 *Esp.* 235; *Wilson v. Bowie*, 1 *Car. & P.* 8.

<sup>103</sup> *Wilson v. Bowie*, 1 *Car. & P.* 8.

<sup>104</sup> *Calvert v. Flower*, 7 *Car. & P.* 386.

The Supreme Court of Maine, in an early case, followed the English decisions and said: "The rule is, that if the book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; and if the party giving the notice takes and inspects it, he takes it as testimony, and it may be used, if material to the issue."<sup>105</sup> In a later case the same court said: "Notice to produce would not make the book evidence, but inspection of it would."<sup>106</sup> The Massachusetts Supreme Court has emphasized the rule in the following language: "The paper which was produced by the plaintiff on notice from the defendant ought not to have been excluded. There was no doubt concerning the identity of the document. The paper produced was the one for which the defendant had called, and it was examined by the defendant's counsel. Under such circumstances it was the right of the plaintiff to use it in evidence, if the defendant refused or omitted to put it into the case. A party cannot require his adversary to produce a document, and, after inspecting it, insist on excluding it from the case altogether. Such a course of proceeding would give one party an unfair advantage over the other. He would gain the privilege of looking into the private documents of the other party without any corresponding obligation or risk on his own part. It is, therefore, generally deemed a just and wise rule that in such cases the paper called for and produced, after it had been seen and examined by the party calling for it, becomes competent evidence in the case for both parties."<sup>107</sup> This court, however, emphasizes one proposition and regarding it says: "To render a paper competent under such circumstances it must appear that it was the identical paper called for; otherwise, a party might foist into the case documents not sought for by the adverse party, and thus manufacture evidence in his own favor."<sup>108</sup> The rule as declared in some jurisdictions is that the party producing the documents on notice may decline to permit his adversary to examine them except on the condition that if examined they shall be read in evidence.<sup>109</sup>

<sup>105</sup> *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; *Blake v. Russ*, 33 Me. 360; *Merrill v. Merrill*, 67 Me. 70; *Wooten v. Nall*, 18 Ga. 609; *Cushman v. Coleman*, 92 Ga. 772; *Randel v. Chesapeake, &c. Co.* 1 Harr. (Del.) 233; *Wilson v. Bowie*, 1 Car. & P. 8; *Clark v. Fletcher*, 1 Allen (Mass.) 53; *Long v. Drew*,

114 Mass. 77; *Anderson v. Root*, 16 Miss. 362.

<sup>106</sup> *Tilton v. Wright*, 74 Me. 214.

<sup>107</sup> *Clark v. Fletcher*, 1 Allen (Mass.) 53.

<sup>108</sup> *Reed v. Anderson*, 12 Cush. (Mass.) 481; *Clark v. Fletcher*, 1 Allen (Mass.) 53.

<sup>109</sup> *Huckins v. People's, &c. Ins.*

§ 1446. **Production—Instrument not evidence.**—The true rule seems to be that the fact that notice has been given to an adverse party to produce papers or documents for use at the trial does not of itself make such instruments evidence. The party serving the notice may introduce the instrument at his option, but it does not follow that the party producing it can do so. The rule is stated by a law writer as follows: "If produced on motion, it may be read by the party who has requested its production, but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been to read it without proof."<sup>110</sup> "A different rule would produce the result of making evidence by the mere act of notice; and a false instrument might be introduced which it would be difficult if not impossible to disprove."<sup>111</sup> When the instrument is produced pursuant to the notice, the party giving the notice cannot refuse to use it and offer a copy in its stead; but after the party producing the instrument introduces it in evidence, the first party may show wherein it is erroneous or defective.<sup>112</sup>

§ 1447. **Instruments not evidence—New Hampshire and Pennsylvania rule.**—The Supreme Court of New Hampshire, in a fairly modern case, has a most thorough and exhaustive discussion of the entire subject and collects many of the English and American authorities, showing the weakness and strength of the argument in many of them, and expresses its conclusions as follows: "There is, therefore, no such weight of authority as should lead us to adopt a rule which does not commend itself to our judgment and is not in accordance with our practice in analogous cases. It becomes necessary for us, entertaining these views, to inquire if any sound distinction under the alleged English rule could have been founded upon the fact that the book here was not produced under a formal notice. Here the plaintiff, being a witness, produced his father's book upon request, and we perceive no reason why any different rule in this respect should be applied to him from that applied to other witnesses. We are, therefore, of the opinion that the inspection of the book by the defend-

Co. 31 N. H. 113; *Austin v. Thompson*, 45 N. H. 113; *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Wentworth v. McDuffie*, 48 N. H. 402; *Stett v. Huidekopers*, 17 Wall. (U. S.) 384.

<sup>110</sup> 2 Starkie Ev. § 360; *Blight v. Ashley*, 1 Pet. (U. S.) C. C. 15.

<sup>111</sup> *State v. Wisdom*, 8 Port. (Ala.) 511.

<sup>112</sup> *Stitt v. Huidekopers*, 17 Wall. (U. S.) 384; *Rives v. Thompson*, 41 Ga. 68.

ant's counsel did not make it evidence for the plaintiff."<sup>113</sup> The Pennsylvania court has practically adopted and followed the same rule as laid down in New Hampshire, but makes certain limitations on the rule in reference to books containing a variety of distinct and unconnected matters, and on this subject say: "It cannot be pretended that the party producing them will be enabled to use them for the purpose of introducing matter impertinent to the issue, or, indeed, any other fact which they would not be competent to establish if the usual introductory evidence of authenticity had been previously given. Here the defendants were, for all purposes of explanation, entitled to the benefit of everything necessarily connected with the entry relied on by the plaintiff, which other books contained at the time the suit was brought; but entries made afterwards could avail them on no principle of evidence or reason. There would be little value in evidence thus procured, and, indeed, an end to proceeding by notice altogether, if after the suit was brought, and it might be notice actually received, the adverse party could sit down and make entries at pleasure, and insist on having these admitted to avoid the effects of previous entries or to charge his antagonist on new and distinct grounds. It would be most unjust to say a party should neither use the entries in his adversary's books, nor give parol evidence of their contents, unless in connection with whatever the latter might choose to subjoin."<sup>114</sup>

§ 1448. **Instruments not evidence—New York rule.**—One of the earliest New York cases seems to hold that the mere production of papers and documents on notice is sufficient to make them evidence for all purposes;<sup>115</sup> while another early case denies this rule and is disposed to follow the New Hampshire rule.<sup>116</sup> But a very recent and well considered case, after citing many authorities and discussing the English and American rules generally, holds that the party producing the paper pursuant to notice can derive no advantage whatever therefrom, and the conclusions of the court are stated as follows: "The authorities on the question are divided. But we perceive no reason for departing from the rule as understood in this state. The claim that

<sup>113</sup> Austin v. Thompson, 45 N. H. 113; Wentworth v. McDuffie, 48 N. H. 402.

<sup>114</sup> Withers v. Gillespy, 7 S. & R. (Pa.) 10; Summers v. McKim, 12 S. & R. (Pa.) 405; Towers v. Hagner, 3 Whart. (Pa.) 48. See, also,

Farmers', &c. Bank v. Israel, 6 S. & R. (Pa.) 292.

<sup>115</sup> Lawrence v. Van Horne, 1 Cai. (N. Y.) 276.

<sup>116</sup> Kenny v. Clarkson, 1 Johns. (N. Y.) 385.



it gives the party calling for the paper an unfair advantage, if he may inspect it and then decline to put it in evidence, seems to us rather specious than sound. . . . The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice. The production of books and papers on notice is the voluntary act of the party. If he refuses it may, as is claimed, authorize the other party to give secondary evidence of their contents, which the party having possession cannot then answer by producing them. But if they contain facts favorable to the other side they ought to be disclosed, and if production is refused the party refusing may justly incur the danger of having secondary proof given of their contents.”<sup>117</sup>

<sup>117</sup> *Smith v. Rentz*, 131 N. Y. 169.

## CHAPTER LXX.

### LOST INSTRUMENTS—PROOF OF LOSS AND SEARCH.

Sec.		Sec.	
1449.	Loss of primary — Secondary admissible.	1464.	Search—In proper place.
1450.	Accounting for the original.	1465.	Search — Place — Presumption of loss.
1451.	No definite rule.	1466.	Search—In probable place.
1452.	Loss—Burden of proof.	1467.	Search—Proper custodian.
1453.	Loss—Order of proof.	1468.	Search — Proper custodian — Extent.
1454.	Loss—Extent of proof required.	1469.	When custodian is out of state—Sufficient.
1455.	Loss—Insufficient proof.	1470.	When custodian is out of state—Insufficient.
1456.	Loss — Proof addressed to court—Discretion.	1471.	Custodian out of state — Proof of contents.
1457.	Loss—Degree of proof.	1472.	Custodian's admission of loss — Sufficiency.
1458.	Execution and existence of original.	1473.	Custodian's admission of loss — Insufficient.
1459.	Search.	1474.	Voluntary destruction — By party.
1460.	Search—Illinois rule.	1475.	Voluntary destruction—California rule.
1461.	Search—Oregon rule.		
1462.	Search—Proof of details.		
1463.	Search—Importance of document.		

§ 1449. **Loss of primary — Secondary admissible.**—As no secondary evidence can be admitted while the primary evidence is in existence, therefore, to justify the introduction of the secondary, the absence of the primary must be duly accounted for. It must, ordinarily, be made to appear: (1) that it is lost or destroyed; (2) that it is in the possession of the adverse party who refused to produce it on notice; (3) or that it is beyond the jurisdiction of the court; (4) that it is in the hands of a stranger who refuses to produce it. The excuse for its non-production must be by such proof as the law

deems to be sufficient, but the manner of proving the loss may vary with the facts in each particular case.<sup>1</sup> A few other exceptional

- <sup>1</sup>*Riggs v. Taloe*, 9 Wheat. (U. S.) 483; *Sebree v. Dorr*, 9 Wheat. (U. S.) 558; *Bouldin v. Massie*, 7 Wheat. (U. S.) 122; *United States v. Reyburn*, 6 Pet. (U. S.) 352; *United States v. Price*, 113 Fed. 851; *Dunbar v. United States*, 156 U. S. 185; *Burton v. Driggs*, 20 Wall. (U. S.) 125; *Dwyer v. Dunbar*, 5 Wall. (U. S.) 318; *Tobin v. Roaring Creek, &c. Co.*, 86 Fed. 1020; *Hussey v. Roquemore*, 27 Ala. 281; *Monts v. Stephens*, 43 Ala. 217; *Manning v. Maroney*, 87 Ala. 563, 6 So. 343; *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796; *Foster v. State*, 88 Ala. 182, 7 So. 185; *Georgia Pac. R. Co. v. Propst*, 90 Ala. 1, 7 So. 635; *Roach v. Privett*, 90 Ala. 391, 7 So. 808; *Farrow v. Nashville, &c. R.* 109 Ala. 448, 20 So. 303; *Branch v. Smith*, 114 Ala. 463, 21 So. 423; *Burgess & Co. v. Blake*, 128 Ala. 105, 28 So. 963; *Williams v. Brummel*, 4 Ark. 129; *Norris v. Kellogg*, 7 Ark. 112; *Fresno Canal, &c. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 53; *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189; *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639; *Rockwell, &c. Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180; *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868; *Allen v. State*, 21 Ga. 217; *Sutton v. McLoud*, 26 Ga. 638; *Holcombe v. State*, 28 Ga. 66; *Bigelow v. Young*, 30 Fla. 121; *Oliver v. Persons*, 30 Ga. 391; *Watkins v. Paine*, 57 Ga. 50; *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 6 S. E. 27; *Solomon & Son v. Creech*, 82 Ga. 445, 9 S. E. 165; *Phillips v. Trowbridge Fur. Co.*, 86 Ga. 699, 13 S. E. 19; *Western U. Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349; *Idaho Mer. Co. v. Kalanquin*, 7 Idaho, 295, 66 Pac. 933; *Corcoran v. Sonora Min. &c. Co. (Idaho)*, 71 Pac. 127; *Hanson v. Armstrong*, 22 Ill. 442; *Matteson v. Noyes*, 25 Ill. 481; *King v. Worthington*, 73 Ill. 161; *Fisher v. Greene*, 95 Ill. 98; *Scott v. Bassett*, 186 Ill. 98, 57 N. E. 835; *Glos v. Hallowell*, 190 Ill. 65, 60 N. E. 62; *Chisholm v. Beaver Lake L. Co.* 18 Ill. App. 131; *Smith v. Reed*, 7 Ind. 242; *Ohio Ind. Co. v. Nunemacher*, 10 Ind. 234; *Manson v. Blair*, 15 Ind. 242; *Gimbel v. Hufford*, 46 Ind. 125; *Western U. Tel. Co. v. Hopkins*, 49 Ind. 223; *McMakin v. Weston*, 64 Ind. 270; *Coffing v. Carnahan*, 122 Ind. 427, 23 N. E. 855; *Newton v. Donnelly*, 9 Ind. App. 359, 36 N. E. 769; *McFadden v. Ross*, 14 Ind. App. 312, 41 N. E. 607; *Jenkins v. Lutz*, 26 Ind. App. 150, 59 N. E. 288; *Perry v. Archard*, 1 Ind. Ter. 437; *Missouri, &c. R. Co. v. Elliott*, 2 Ind. Ter. 407; *Williams v. Heath*, 22 Iowa, 519; *Ackley v. Sexton*, 24 Iowa, 320; *Byington v. Oaks*, 32 Iowa, 488; *Gimbel v. Salomon*, 54 Iowa, 389, 6 N. W. 582; *In re Edwards (Iowa)*, 10 N. W. 793; *Monk v. Carbin*, 58 Iowa, 508, 12 N. W. 571; *Ruthven v. Clarke*, 109 Iowa, 25, 79 N. W. 454; *Watson v. Richardson*, 110 Iowa, 673; *Perkins v. Ermel*, 2 Kans. 325; *City of Waterville v. Hughan*, 18 Kans. 473; *Central Branch U. P. R. Co. v. Walters*, 24 Kans. 504; *West v. Cameron*, 39 Kans. 736, 18 Pac. 894; *Roberts v. Dixon (Kans.)*, 31 Pac. 1083; *Hughes v. Easten*, 27 Ky. 572, 20 Am. Dec. 230; *Beattyville Coal Co. v. Hoskins (Ky.)*, 44 S. W. 363; *Knight v. Knight*, 12 La. Ann. 396; *Lawrence v. Burris*,

instances in which secondary evidence may be used, on a proper

- 13 La. Ann. 611; *Gaines v. Page*, 15 La. Ann. 108; *Carpenter v. Featherston*, 15 La. Ann. 235; *Perkins v. Bard*, 16 La. Ann. 443; *Marks v. Winter*, 19 La. Ann. 445; *Elwell v. Cunningham*, 74 Me. 127; *Hayward v. Carroll*, 4 Har. & J. (Md.) 518; *Marshall v. Haney*, 9 Gill (Md.) 251; *Young v. Mertens*, 27 Md. 114; *Smith v. Easton*, 54 Md. 138; *Gunther v. Bennett*, 72 Md. 385; *Caledonian Ins. Co. v. Traub*, 83 Md. 524; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Young v. Mackall*, 3 Md. Ch. 398; *Boynton v. Rees*, 25 Mass. (8 Pick.) 329, 19 Am. Dec. 326; *Brackett v. Evans*, 55 Mass. (1 Cush.) 79; *Washington Co. &c. Ins. Co. v. Dawes*, 72 Mass. (6 Gray) 376; *Miles v. Stevens*, 142 Mass. 571, 8 N. E. 428; *Van Ness v. Hadsell*, 54 Mich. 560, 20 N. W. 585; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Woods v. Burke*, 67 Mich. 674, 35 N. W. 798; *Knickerbocker v. Wilcox* (Mich.), 47 N. W. 124; *Tanner v. Page*, 106 Mich. 155, 63 N. W. 993; *Guerin v. Hunt*, 6 Gilf. 260; 6 Minn. 375; *Groff v. Ramsey*, 19 Minn. 44; *Electric Co. v. Palmer* (Minn.), 53 N. W. 1137; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *Weiler v. Monroe Co.* 74 Miss. 682; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Carr v. Carr*, 36 Mo. 408; *Attwell v. Lynch*, 39 Mo. 519; *Strain v. Murphy*, 49 Mo. 337; *Sims v. Gray*, 66 Mo. 613; *West v. West*, 75 Mo. 204; *Hoskinson v. Adkins*, 77 Mo. 537; *Pierce v. Georger*, 103 Mo. 540, 15 S. W. 848; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Wolff v. Matthews*, 39 Mo. App. 376; *Zollman v. Tarr*, 93 Mo. App. 234; *Stapleton v. Pease*, 2 Mont. 550; *Delaney v. Errickson*, 10 Neb. 492, 35 Am. R. 487; *McClure v. Campbell*, 25 Neb. 57, 40 N. W. 595; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Westinghouse Co. v. Tilden*, 56 Neb. 129, 76 N. W. 416; *Wallace v. Goodall*, 18 N. H. 439; *Belknap v. Wendell*, 31 N. H. 92; *Morrill v. Foster*, 32 N. H. 358; *Brighton, &c. Bank v. Philbrick*, 40 N. H. 506; *Bozorth v. Davidson*, 3 N. J. L. 200; *Chambers v. Hunt*, 22 N. J. L. 552; *Cary v. Campbell*, 10 Johns. (N. Y.) 363; *Heller v. Heine*, 38 Misc. (N. Y.) 816; *Hartman v. Hoffman*, 65 N. Y. App. Div. 443; *Collins v. Shaffer*, 78 Hun (N. Y.) 512; *Myers v. Long Island R. Co.* 10 N. Y. St. 430; *Murphy v. M'Niel*, 19 N. Car. (2 Dev. & B. L.) 244; *Dumas v. Powell*, 14 N. Car. (3 Dev. L.) 103; *Rumbough v. Southern Imp. Co.* 113 N. Car. 751, 34 Am. St. 528; *Richardson v. Fellner*, 9 Okla. 513; *Curtis v. Patton*, 6 S. & R. (Pa.) 135; *Sweigart v. Lowmarter*, 14 S. & R. (Pa.) 200; *Lodge v. Berrier*, 16 S. & R. (Pa.) 297; *Brown v. Burr*, 160 Pa. St. 458, 28 Atl. 828; *Stern v. Stanton*, 184 Pa. St. 468, 39 Atl. 404; *Bowman v. Smith*, 1 Strobh. (S. Car.) 246; *Mowry v. Schroder*, 4 Strobh. (S. Car.) 69; *Moore v. Dickinson*, 39 S. Car. 441; *Woodward v. Stark*, 4 S. Dak. 588; *Miller v. Durst*, 14 S. Dak. 587; *Saunders v. Harris*, 5 Humph. (Tenn.) 345; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331; *Mugge v. Adams*, 76 Tex. 448, 13 S. W. 330; *Kempner v. Galveston Co.* 76 Tex. 450, 13 S. W. 460; *Guadalupe, &c. Assn. v. West*, 76 Tex. 461, 13 S. W. 307; *Missouri Pac. R. Co. v. Lamothe*, 76 Tex. 219, 13 S. W. 194;

showing, are given elsewhere.<sup>2</sup> It is universally held that when the loss of a document is once established by sufficient evidence, under the rules hereafter given, its contents, when relevant, and otherwise admissible, may then be proved by some species of evidence.<sup>3</sup>

Texas, &c. Co. v. Arkell, 29 S. W. 816; Grayson v. Peyton, 67 S. W. 1074; Missouri, &c. R. Co. v. Dilworth, 67 S. W. 88; Missouri, &c. R. Co. v. Mazzie, 68 S. W. 56; Durkee v. Vermont, &c. R. Co. 29 Vt. 127; Murray v. Mattison, 67 Vt. 553, 32 Atl. 479; Fox v. Lambson, 8 N. J. L. 339.

<sup>2</sup> Vol. I, § 210.

<sup>3</sup> Derrett v. Alexander, 25 Ala. 265; Stockbridge v. W. Stockbridge, 12 Mass. 400; Adams v. Betz, 1 Watts (Pa.) 427; Donaldson v. Winter, 1 Miller (La.) 136; Jackson v. Cullum, 2 Blackf. (Ind.) 228; Newcomb v. Drummond, 4 Leigh (Va.) 57; Gentry v. Hochcraft, 7 Mon. (Ky.) 242; Craig v. Horine, 1 Bibb (Ky.) 8; White v. Lovejoy, 3 Johns. (N. Y.) 448; Hilts v. Calvin, 14 Johns. (N. Y.) 182; Fowler v. More, 4 Ark. 570; James v. Biscoe, 10 Ark. 184; Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477; In re Moore, 72 Cal. 335, 13 Atl. 885; Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Bruns v. Clase, 9 Colo. 225, 11 Pac. 79; Oppenheimer v. Denver, &c. R. Co. 9 Colo. 320; Terpening v. Holton, 9 Colo. 306, 12 Pac. 189; Conway v. John, 14 Colo. 30, 23 Pac. 170; Allen v. State, 21 Ga. 217; Bigelow v. Young, 30 Ga. 121; Schaeffer v. Georgia R. Co. 66 Ga. 39; Silva v. Rankin, 80 Ga. 79, 4 S. E. 756; Georgia Pac. R. Co. v. Strickland, 80 Ga. 776; Orne v. Cook, 31 Ill. 238; Thatcher v. Olmstead, 110 Ill. 26; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; People v. Pike, 197 Ill.

449; Fairbanks v. Campbell, 53 Ill. App. 216; Jack v. Rowland, 98 Ill. App. 352; Johnston Harvester Co. v. Bartley, 94 Ind. 131; Bundy v. Cunningham, 107 Ind. 360, 8 N. E. 174; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115; Coffing v. Carnahan, 122 Ind. 427, 23 N. E. 855; Bell v. Byerson, 11 Iowa, 233; Lyons v. Van Gorder, 77 Iowa, 600, 42 N. W. 500; In re Rea, 82 Iowa, 231, 48 N. W. 78; Frick v. Kabaker, 116 Iowa, 494; Brock v. Cottingham, 23 Kans. 383; Chicago, &c. R. Co. v. Brown, 44 Kans. 384; Western U. Tel. Co. v. Collins, 45 Kans. 88, 25 Pac. 187; Central Branch, &c. R. Co. v. Walters, 24 Kans. 504; Reed v. Lawless, 14 Ky. (4 Litt.) 218; Griffith v. Huston, 7 J. J. Marsh. (Ky.) 386; Dowrey v. Logan, 51 Ky. (12 B. Mon.) 236; Roebuck v. Curry, 2 La. 998; Pendery v. Crescent, &c. Ins. Co. 21 La. Ann. 410; Mercier v. Haman, 39 La. Ann. 94; Benton v. Benton, 106 La. 99, 30 So. 137; Gore v. Elwell, 22 Me. 442; Baptist House v. Webb, 66 Me. 398; Gunther v. Bennett, 72 Md. 384; Jones v. Fales, 5 Mass. 101; Taunton, &c. Corp. v. Whiting, 10 Mass. 327; Andrews v. Hooper, 13 Mass. 472; Commonwealth v. Roark, 62 Mass. 210; Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Goodrich v. Weston, 102 Mass. 362; Ovington v. Lowell, &c. R. Co. 163 Mass. 440, 40 N. E. 767; People v. Dennis, 4 Mich. 609; Woods v. Burke, 67 Mich. 674, 35 N. W. 798; Cook v. Bertram, 86 Mich. 356, 49 N. W.

§ 1450. **Accounting for the original.**—Before a party will be permitted to introduce secondary evidence of the contents of a document or writing, on account of its loss, he must, by way of preliminary proof, establish the loss or a reasonable presumption of the loss of the written instrument.\* In raising this presumption of

42; *Nichols v. Howe*, 43 Minn. 181, 45 N. W. 14; *Cilley v. Van Patten*, 68 Mich. 80, 35 N. W. 831; *June v. Labadie* (Mich.) 92 N. W. 937; *Doe v. McCaleb*, 2 How. (3 Miss.) 756; *Adams v. Guice*, 30 Miss. 397; *Martin v. Williams*, 42 Miss. 210; *Page v. State*, 59 Miss. 474; *Turner v. Thomas*, 77 Miss. 864, 28 So. 803; *Strain v. Murphy*, 49 Mo. 337; *Addis v. Graham*, 8 Mo. 197; *Smith v. Lindsey*, 89 Mo. 76, 1 S. W. 88; *Wise v. Loring*, 59 Mo. App. 269; *Wilson v. Reeves*, 70 Mo. App. 30; *Frick Co. v. Marshall*, 86 Mo. App. 463; *Land, &c. Co. v. Moss Tie Co.* 87, Mo. App. 167; *McClure v. Campbell*, 25 Neb. 57; *Watson v. Roode*, 30 Neb. 264, 40 N. W. 595; *Myers v. Bealer*, 30 Neb. 280, 46 N. W. 479; *Carr, Ex parte*, 22 Neb. 535, 35 N. W. 409; *City of South Omaha v. Wrzensinski* (Neb.), 92 N. W. 1045; *Larson v. Cox* (Neb.), 93 N. W. 1011; *Mandeville v. Reynolds*, 68 N. Y. 528; *Smith, In re*, 61 Hun (N. Y.) 101; *Robertson v. Council* (N. Car.), 3 S. E. 681; *McConhay v. Centre, &c. Co.* 1 Pen. & W. (Pa.) 426; *Caufman v. Congregation, &c.* 6 Binn. (Pa.) 59; *Meyer v. Barker*, 6 Binn. (Pa.) 228; *Mowry v. Schroder*, 4 Strob. L. (S. Car.) 69; *Reynolds v. Quattlebum*, 2 Rich. (S. Car.) 140; *Perry v. Jefferies*, 61 S. Car. 292; *Western Twine Co. v. Wright*, 11 S. Dak. 521, 78 N. W. 942; *Prather v. Wilkins*, 68 Tex. 187; *Chamberlain v. Boon*, 74 Tex. 659; *Hill v. Taylor*, 77 Tex. 295; *Rhodus v. Sansom* (Tex.), 6 S. W. 849; *Colorado Nat'l*

*Bank v. Scott* (Tex.), 16 S. W. 997; *Nelson v. Southern Pac. Co.* 18 Utah, 244; *Scott v. Crouch*, 24 Utah, 377, 67 Pac. 1068; *Brown v. Richmond*, 27 Vt. 583; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Timberlake v. Jennings* (Va.), 13 S. E. 28; *Williams v. Miller & Co.* 1 Wash. Ter. 88; *Service v. Deming Inv. Co.* 20 Wash. 668, 56 Pac. 837; *Diener v. Diener*, 5 Wis. 483; *Bartlett v. Hunt*, 17 Wis. 214; *Goldberg v. Ahnapee, &c. R. Co.* 105 Wis. 1, 76 Am. St. 899; *Childrey v. City of Huntington*, 34 W. Va. 457, 12 S. E. 536; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Renner v. Bank*, 9 Wheat. (U. S.) 581; *Patriotic Bank v. Little*, 6 Cranch (U. S.) C. C. 27; *Williams v. Clements*, 1 Taunt. 523; *Dangerfield v. Wilby*, 4 Esp. 159; *Brown v. Mes-siter*, 3 M. & S. 281; *Anderson v. Robson*, 2 Bay (S. Car.) 495; *Lewis v. Baird*, 3 McLean (U. S.) 56; *Ransdals v. Grove*, 4 McLean (U. S.) 282; *United States v. Price*, 113 Fed. 851; *Lunsford v. Smith*, 12 Gratt. (Va.) 554; *Dawson v. Graves*, 4 Call (Va.) 127; *Rauh v. Scholl*, 12 Wash. 135, 40 Pac. 726; *Fisk v. Tank*, 12 Wis. 306; *Newell v. Clapp*, 97 Wis. 104, 72 N. W. 366; *Miller v. Crawford County*, 106 Wis. 210; 1 *Greenleaf Ev.* §§ 509, 558.

\* *Harper v. Scott*, 12 Ga. 125; *Elwell v. Mercick*, 50 Conn. 272; *Anderson v. Maberry*, 58 Tenn. (2 Heisk.) 653; *McKesson v. Smart*, 108 N. Car. 17, 13 S. E. 96.

loss the preliminary proofs must show that all reasonable means have been taken to procure and produce the original.<sup>5</sup> The law justly and properly requires the use of all reasonable means to produce the primary evidence; but if by the use of due diligence it cannot be produced other proof of the contents of the lost document becomes admissible. At the same time the law requires that this rule of evidence be so applied as to promote the ends of justice and guard against fraud and imposition.<sup>6</sup> A party offering a copy of an instrument or seeking to prove the contents of a document or writing by parol, is generally presumed to have the original in his possession or under his control, and this presumption must be removed before such copy or parol evidence can be admitted.<sup>7</sup> Naturally the rule is that the best evidence must be produced. If evidence of inferior grade is offered it raises the presumption that the better evidence is withheld for some sinister purpose, and before such inferior evidence is admitted the court to whom the preliminary proof is addressed will require satisfactory proof that the better evidence is not voluntarily withheld.<sup>8</sup> So where the original document or paper was executed in duplicate, the loss of all the parts must generally be established by the proof before secondary evidence of the contents will be heard.<sup>9</sup>

§ 1451. **No definite rule.**—In these matters the law recognizes the difficulty of laying down any fixed or general rules. The variety of facts and circumstances attending each different case renders im-

<sup>5</sup> *Bourne v. Buffington*, 125 Mass. 481; *De Witt v. Prescott*, 51 Mich. 298, 16 N. W. 656; *Insurance Co. v. Caldwell*, 3 Wend. (N. Y.) 296; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *United States v. Duff*, 6 Fed. 45; *Perry v. Archard*, 1 Ind. Ter. 487; *Sterling v. Potts*, 5 N. J. L. 773; *Wills v. McDole*, 5 N. J. L. 501 (577).

<sup>6</sup> *Renner v. Bank, &c.* 9 Wheat. (U. S.) 581; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Hathaway v. Spooner*, 9 Pick. (Mass.) 23; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Jones v. Fales*, 5 Mass. 101; *Freeman v. Arkell*, 2 B. & C. 494; *Brewster v. Sewell*, 3 B. &

*Ald.* 296; *Kelsey v. Hanmer*, 18 Conn. 311; *Doe d. Vaughn v. Biggers*, 6 Ga. 188; *Clark v. Hornbeck*, 17 N. J. Eq. 430; *Caufman v. Presbyterian Cong. &c.* 6 Bin. (Pa.) 59.

<sup>7</sup> *Sims v. Sims*, 5 Humph. (Tenn.) 370; *Saunders v. Harris*, 5 Humph. (Tenn.) 345; *Sampson v. Marr*, 7 Baxt. (Tenn.) 486.

<sup>8</sup> *Mordecai v. Beal*, 8 Port. (Ala.) 529; *Anglo-American, &c. Co. v. Cannon*, 31 Fed. 313.

<sup>9</sup> *Matthews v. Union Pac. R. Co.* 66 Mo. App. 663; *Rex v. Castleton*, 6 T. R. 236, Bull. N. P. 254; *Alvion v. Furnival*, 1 C. M. & R. 292.

possible, or at least impracticable, the statement of a rule that may fit all cases. This difficulty was stated by one court as follows: "It is not practicable to lay down a definite and comprehensive rule that shall meet the exigencies of all cases and accurately define the degree of diligence which the party must employ in his search for the missing instrument. Each case depends more or less upon its own peculiar circumstances, and these circumstances must suggest the extent and thoroughness of the search."<sup>10</sup> The party is generally expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, the party seeking to introduce the secondary evidence need not, on ordinary occasions, make a search for the original document as for stolen goods, nor need he be in a position to negative every possibility of its having been kept back.<sup>11</sup>

§ 1452. **Loss—Burden of proof.**—The party seeking to introduce secondary evidence as to the contents of a written instrument, has the burden of proof to show its loss, and it should clearly appear that proper efforts had been made to find the instrument. A thing cannot be said to be lost or mislaid for which no search has been made.<sup>12</sup> But where there are several sources of information of the same fact, it has been held that it is not necessary to show that all have been exhausted before secondary evidence is admissible.<sup>13</sup>

<sup>10</sup> *Christy v. Kavanagh*, 45 Mo. 375; *Barton v. Murrain*, 27 Mo. 235.

<sup>11</sup> *Brashears v. State*, 58 Md. 563; *Christy v. Kavanagh*, 45 Mo. 375; *Barton v. Murrain*, 27 Mo. 235; *Mariner v. Saunders*, 5 Gilm. (Ill.) 113; *McConey v. Wallace*, 22 Mo. App. 377; *Doe d. Vaughn v. Biggers*, 6 Ga. 188; *King v. Inhabitants of Morton*, 4 M. & S. 48; *King v. Inhabitants of Metherringham*, 6 T. R. 556; *Thompson v. Travis*, 8 Scott, 85; *Glenn v. Rogers*, 3 Md. 312; *Carr v. Miner*, 42 Ill. 179; *United States v. Sutter*, 21 How. (U. S.) 170; *Viles v. Moulton*, 11 Vt. 470; *Taylor v. Clark*, 49 Cal.

671; *Gathercole v. Miall*, 15 M. & W. 319; *Florsheim v. Palmer*, 99 Ill. App. 559; *Sussex Co. & c. Ins. Co. v. Woodruff*, 26 N. J. L. 541; 1 *Taylor Ev.* § 399; *Roscoe Nisi Prius Ev.* 5, 6, 7; *Roscoe Cr. Ev.* 7, 8; *Wharton Cr. Ev.* § 210; 1 *Starkie Ev.* 624; *Phillips Ev. (Cowen & Hill)* 867; *Am. & Eng. Ency. of Law* (1st Ed.) 13, p. 1095.

<sup>12</sup> *Hansen v. American Ins. Co.* 57 Iowa, 741, 11 N. W. 670.

<sup>13</sup> *Goodrich v. Weston*, 102 Mass. 362; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Commonwealth v. Smith*, 151, Mass. 491, 24 N. E. 677.



The burden is upon a party seeking to prove the contents of a document or writing by parol to show that he cannot produce the original in a reasonable time with reasonable diligence.<sup>14</sup> The rule as to the burden of proof simply requires that the party seeking to introduce the secondary evidence must show his inability to produce the original document in order to render his secondary evidence admissible.<sup>15</sup> The burden is on the party alleging the loss of an instrument to prove its existence, its loss, that a proper search was made for it, and its contents or terms.<sup>16</sup>

§ 1453. **Loss—Order of proof.**—It is not always possible to prove the execution and the loss of the original by the same witness, and it is absolutely impossible to prove both at the same time. The question then arises as to the order of this proof. Naturally the first proof, to be logical, should go to the execution and genuineness of the document or writing, and some courts hold that, in strictness, it must be so.<sup>17</sup> Other courts hold that the order of the proof is immaterial; a party may prove the execution of the instrument or the fact of the loss as his convenience may dictate.<sup>18</sup> The matter is properly in the discretion of the trial court. If counsel should first undertake to prove the loss, on a statement to the court that it would be followed by proof of the execution, this should always be sufficient, and especially so as the court could withhold the proof of the contents of the instrument until both execution and loss were sufficiently established.<sup>19</sup>

§ 1454. **Loss—Extent of proof required.**—As already stated, the failure to produce an original document or paper important and material to the issues, and an attempt to offer to prove its contents by secondary evidence, raises a suspicion of fraud; the law therefore

<sup>14</sup> *Bowick v. Miller*, 21 Ore. 25, 26 Pac. 861.

<sup>15</sup> *Price v. Hunt*, 59 Mo. 258; *Washington Co. v. St. Louis, &c. R. Co.* 58 Mo. 372; *Farrell v. Brennan*, 32 Mo. 328; *Carr v. Carr*, 36 Mo. 408; *Kuhn v. Schwartz*, 33 Mo. App. 610.

<sup>16</sup> *Moore v. Everitt*, 30 Pa. Sup. Ct. 13.

<sup>17</sup> *Shrowders v. Harper*, 1 Harr. (Del.) 444; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; *Kimball*

*v. Morrell*, 4 Me. (4 Greenl.) 368; *Perry v. Roberts*, 17 Mo. 36; *Atwell v. Lynch*, 39 Mo. 519; *Jack v. Woods*, 29 Pa. St. 375.

<sup>18</sup> *Deu v. Pond*, 1 N. J. L. (Coxe) 379; *Fitch v. Bogue*, 19 Conn. 285; *Dowler v. Cushwa*, 27 Md. 354; *Culpepper v. Wheeler*, 2 McMull. (S. Car.) 66; *Jackson v. Woolsey*, 11 Johns. (N. Y.) 446.

<sup>19</sup> *Beall v. Poole*, 27 Md. 645; *Poole v. Beall*, 27 Md. 645; *Young v. Mackall*, 3 Md. Ch. 398.

very wisely provides that the party who desires to prove the contents of an instrument claimed to be lost by secondary evidence is first required to explain fully the circumstances of the loss or non-production of the paper so as to relieve himself from any reasonable suspicion of having connived at its loss.<sup>20</sup> Common experience teaches that without any apparent attempt at chicanery or fraud, the contents of a writing are most easily manufactured, and by reason either of design or through frailty of human memory, are most readily perverted; the law therefore very justly requires strict proof of the loss of the original before its contents may be proved by parol.<sup>21</sup> It is therefore not sufficient to show that the original is not in the hands of the party seeking to introduce the copy, but it should be made to appear that the original is lost or not in the party's control, and that it was not disposed of for the purpose of introducing a copy.<sup>22</sup>

§ 1455. **Loss—Insufficient proof.**—The loss of an instrument is not sufficiently accounted for to admit of secondary evidence on the testimony of a party that it had been misplaced, that he could not find it after diligent search, that he thought it was lost or destroyed, or that it was probably among certain papers which he had packed away for safe keeping and which he had neglected to examine.<sup>23</sup> Nor is the loss of an instrument sufficiently proved to admit secondary evidence where the custodian of the instrument testifies that he either left it with one of the purchasers or lost it in the river.<sup>24</sup> And a party cannot give parol evidence of the contents of a mortgage of which he was not the proper custodian and where he only testified that he did not know where it was.<sup>25</sup>

So it has been said where the question of the loss, or the existence or genuineness of the document or writing, or whether or not there has been a diligent search, is left in doubt by the proof, the court should not admit secondary evidence of the contents.<sup>26</sup>

<sup>20</sup> *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487.

<sup>21</sup> *Sterling v. Potts*, 5 N. J. L. 773 (891).

<sup>22</sup> *Scott v. Bassett*, 174 Ill. 390, 51 N. E. 577; *Scott v. Bassett*, 186 Ill. 98, 57 N. E. 835. See, also, *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851.

<sup>23</sup> *Burks v. Bragg*, 89 Ala. 204, 7 So. 156; *Echols v. Hubbard*, 90 Ala. 309, 7 So. 817; *Phoenix Assur. Co.*

*v. McAuthor*, 116 Ala. 659, 67 Am. St. 154, 22 So. 903; *Johnson v. Mathews*, 5 Kans. 118.

<sup>24</sup> *Ransdale v. Grove*, 4 McLean (U. S.) 282.

<sup>25</sup> *Horseman v. Todhunter*, 12 Iowa, 230; *Howe Machine Co. v. Stiles*, 53 Iowa, 424, 5 N. W. 577.

<sup>26</sup> *Nolan v. Pelham*, 77 Ga. 262, 2 S. E. 639. But see post §§ 1457, 1459.

§ 1456. **Loss—Proof addressed to court—Discretion.**—The proof of the loss of a document or instrument of writing and the accounting for its non-production in order to render the introduction of secondary evidence proper is preliminary in its nature and is addressed to the sound discretion of the trial court to be governed by the circumstances of the case. That is, before the party can give secondary evidence of the contents of a lost document or writing to the jury he must satisfy the court in some manner of the loss or destruction of the original. The jury have nothing whatever to do with this question as it is addressed to the court, and when the court decides that the loss or destruction is sufficiently proved, then the secondary evidence of the contents goes to the jury.<sup>27</sup>

\* *Mordecai v. Beal*, 8 Port. (Ala.) 529; *Glassell v. Mason*, 32 Ala. 719; *Burks v. Bragg*, 89 Ala. 204, 7 So. 156; *Bagley v. McMickle*, 9 Cal. 430; *Witter v. Latham*, 12 Conn. 399; *Fitch v. Bogue*, 19 Conn. 285; *Elwell v. Mersick*, 50 Conn. 272; *Bell v. Kendrick*, 25 Fla. 778; *Doe v. Vaughn v. Biggers*, 6 Ga. 188; *Bigelow v. Young*, 30 Ga. 121; *Graham v. Campbell*, 56 Ga. 258; *Florschheim v. Palmer*, 99 Ill. App. 559; *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652; *Bain v. Walsh*, 85 Me. 108, 14 Atl. 730; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Page v. Page*, 15 Pick. (Mass.) 368; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Burt v. Long*, 106 Mich. 210, 64 N. W. 60; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *State v. Salverson*, 87 Minn. 40; *Christy v. Kavanagh*, 45 Mo. 375; *Henry v. Diviney*, 101 Mo. 378, 13 S. W. 1057; *Wells v. Pressy*, 105 Mo. 164, 16 S. W. 670; *Kleinschmidt v. Dunphy*, 1 Mont. 118; *Fremont, &c. R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. 482; *Bachelor v. Nutting*, 16 N. H. 261; *Hill v. Barney*, 18 N. H. 607; *Pearson v. Wheeler*, 55 N. H. 41; *Sussex Co. &c. Ins. Co. v. Wood-*

*ruff*, 26 N. J. L. 541; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. St. 527; *Longstreth v. Korb*, 64 N. J. L. 112; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Woodworth v. Barker*, 1 Hill. (N. Y.) 172; *West v. New York, &c. R. Co.* 55 N. Y. App. Div. 464; *Mason v. Libbey*, 90 N. Y. 683; *Fisher v. Carroll*, 6 Ind. Eq. (N. Car.) 488; *Clifton v. Fort*, 98 N. Car. 178, 3 S. E. 726; *Mobley v. Watts*, 98 N. Car. 284, 3 S. E. 677; *Bonds v. Smith*, 106 N. Car. 553; *Blackburn v. Blackburn*, 8 Ohio, 81; *Hobbs v. Beard*, 43 S. Car. 370; *Elrod v. Cochran*, 59 S. Car. 457; *Anderson v. Maberry*, 2 Heisk. (58 Tenn.) 653; *Tyree v. Magness*, 1 Sneed (Tenn.) 276; *More v. Beattie*, 33 Vt 219; *Harvey v. Mitchell*, 2 M. & Rob. 366; *Walker v. Beauchamp*, 6 C. & P. 552; *Williams v. Hill*, 16 Kans. 23; *Stratton v. Hawks*, 43 Kans. 538; *Brashears v. State*, 58 Md. 563; 1 *Starkie Ev.* 354. *Contra: Coleman v. Wolcott*, 4 Day (Conn.) 388; *Read v. Brookman*, 3 T. R. 151; *Beckford v. Jackson*, 1 Esp. 337. And compare *Mariner v. Saunders*, 10 Ill. (5 Gilm.) 113; *McKesson v. Smart*, 108 N. Car. 17, 13 S. E. 96; *Gillis v. Wilmington, &c. R. Co.*

The evidence to satisfy the court must be determined by the necessity of each particular case. Stating the principle in the form of a rule, it is only necessary to produce sufficient evidence to satisfy the trial court of the fact that the original is not in the possession or under the control of the party offering the secondary evidence.<sup>28</sup> The court must be satisfied that the primary evidence is unattainable, and as the admission of secondary evidence is denied for the prevention of fraud, it is said to be only necessary to free the mind of the court from suspicions of fraud or sinister motives.<sup>29</sup>

The finding or conclusion of the trial court on the question of the loss or destruction of the original and the admissibility of secondary evidence of its contents, is not subject to review except in cases of an abuse of the discretion lodged in the trial court. The real reason of this rule is that the trial court has the witnesses before it and observes their conduct and takes cognizance of all the facts and circumstances of the case and on review the appellate court would be passing on the weight of the evidence.<sup>30</sup>

108 N. Car. 441, 13 S. E. 11; Gorgas v. Heitz, 150 Pa. St. 538, 24 Atl. 756; Strause v. Braunventer, 14 Pa. Sup. Ct. 125; McConey v. Wallace, 22 Mo. App. 377; Livingston v. Rogers, 1 Cai. Cas. (N. Y.) 27; Jackson d. Dunbar v. Todd, 3 Johns. (N. Y.) 300; Tayloe v. Riggs, 1 Pet. (U. S.) 591; Molin v. Barton, 27 Minn. 530, 8 N. W. 765; Stowe v. Turner, L. R. 5 Exch. 155; Jackson v. Frier, 16 Johns. (N. Y.) 196; Steele v. Lord, 70 N. Y. 280, 26 Am. R. 602; Blade v. Noland, 12 Wend. (N. Y.) 173; Livingston v. Rogers, 2 Johns. Cas. (N. Y.) 488; Walker v. Curtis, 116 Mass. 98; Lindauer v. Meyberg, 27 Mo. App. 185; Smith v. Sleaf, 1 C. & K. 48.

<sup>28</sup> Williams v. Hill, 16 Kans. 23; Stratton v. Hawks, 43 Kans. 538, 23 Pac. 591.

<sup>29</sup> Provision Co. v. Cannon, 31 Fed. 313.

<sup>30</sup> Steele v. Lord, 70 N. Y. 280, 26 Am. R. 602; Mason v. Libbey, 90

N. Y. 683; Hobbs v. Beard, 43 S. Car. 370; Elrod v. Cochran, 59 S. Car. 467; Walker v. Curtis, 116 Mass. 98; Miles v. Stevens (Mass.), 8 N. E. 426; Williams v. Hill, 16 Kans. 23; Stratton v. Hawks, 43 Kans. 538, 23 Pac. 591; Durgin v. Danville, 47 Vt. 95; Elwell v. Mersick, 50 Conn. 272; Brigham v. Coburn, 10 Gray (Mass.) 329; Commonwealth v. Morrell, 99 Mass. 542; Walker v. Curtis, 116 Mass. 98; Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Page v. State, 59 Miss. 474; Kearney v. Mayor, &c. 92 N. Y. 617; Jackson v. Frier, 16 Johns. (N. Y.) 193; Mason v. Libbey, 64 How. Pr. (N. Y.) 267; Gillis v. Wilmington, &c. R. Co. 108 N. Car. 441; Mauney v. Crowell, 84 N. Car. 314; Camden v. Belgrade, 78 Me. 204, 3 Atl. 652; Bain v. Walsh, 85 Me. 108, 26 Atl. 1001; State v. Salverson, 87 Minn. 40, 91 N. W. 1; Fremont, &c. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948.

Some of the cases cited were re-

When the proof of loss or destruction satisfies the mind of the court and secondary evidence of the contents of the instrument is given, the weight and sufficiency of this evidence as to whether or not the evidence or the purported copy is correct, may, however, be a question for the jury.<sup>31</sup>

§ 1457. **Loss—Degree of proof.**—A party seeking to prove the contents of documents or writings by secondary evidence is not required to account for the absence of the originals to a reasonable certainty, nor even, it seems, by what might ordinarily be considered a preponderance of the evidence. The degree or weight of the evidence may vary with the circumstances of each particular case, and the manner of proving the loss may vary with the facts and circumstances of different cases.<sup>32</sup> In some instances very slight evidence has been held sufficient.<sup>33</sup> Where there is no ground of suspicion that the document or paper is purposely suppressed, ordinary diligence to produce or account for the original is all that is required; and such proper or ordinary diligence must depend upon the circumstances of each particular case.<sup>34</sup> And it has been held sufficient if the proof shows a reasonable presumption of the loss of the instrument.<sup>35</sup> So where there has been great lapse of time, strict proof of loss or destruction is not required.<sup>36</sup> The codes of some of the states provide that where no direct issue is made upon the existence and loss of an original document, slight evidence will be sufficient.<sup>37</sup> So where there appears a strong degree of probability that the document or writing is lost or destroyed by accident, it has been

versed on the ground that the court had improperly admitted or excluded the secondary evidence, and in another case it was held error where the trial court admitted secondary evidence of the contents of an instrument where a witness testified that he could not produce the originals without great effort and lengthy search, requiring perhaps two weeks. *DeLoach v. Sarratt*, 55 S. Car. 254, 33 S. E. 2.

<sup>31</sup> *Burrill v. Lumber Co.* 65 Mich. 571, 32 N. W. 824.

<sup>32</sup> *Foster v. State*, 88 Ala. 182, 7 So. 185.

<sup>33</sup> *Turner v. Moore*, 1 Brev. (S.

Car.) 236; *Flinn v. McGonigle*, 9 W. & S. (Pa.) 75.

<sup>34</sup> *Tyree v. Magness*, 1 Sneed (Tenn.) 276; *Anderson v. Maberry*, 58 Tenn. 653; *Low v. Taudy*, 70 Tex. 745, 8 S. W. 620; *Daniels v. Creekmore*, 7 Tex. Civ. App. 573; *Service v. Deming Invt. Co.* 20 Wash. 668.

<sup>35</sup> *Doe d. Vaughn v. Biggers*, 4 Ga. 188; *Harper v. Scott*, 12 Ga. 125.

<sup>36</sup> *Lewis v. Baird*, 3 McLean (U. S.) 56.

<sup>37</sup> *Code of Georgia*, § 3769; *Doe d. Winchester v. Aiken*, 31 Fed. 393.

held that the failure to produce the original will not be permitted to defeat title.<sup>38</sup> And where there is no ground of suspicion that the original has been intentionally suppressed and there appears no discernable motive for deception, courts are extremely liberal as to the admission of secondary evidence and in such cases strict proof of loss or destruction of the original is not required.<sup>39</sup> It has also been held that it is not necessary that the proof show that the loss of the document or paper has been advertised.<sup>40</sup>

**§ 1458. Execution and existence of original.**—To render secondary evidence admissible it is not sufficient alone to prove the loss of the original; but the proof must show further that the instrument had an actual existence, although slight evidence may be sufficient perhaps for this purpose.<sup>41</sup> The genuineness and execution as well as the loss must be shown by some evidence.<sup>42</sup> The proof, it has been held, should show that the original was executed by the parties.<sup>43</sup> Or, stated in another form, the existence and genuineness of the original must be substantively proved.<sup>44</sup> It must be made to appear

<sup>38</sup> *Bouldin v. Massie*, 7 Wheat. (U. S.) 122.

<sup>39</sup> *Proprietors of Braintree v. Battles*, 6 Vt. 395.

<sup>40</sup> *Benton v. Benton*, 106 La. 99, 30 So. 137; *Willett v. Andrews*, 106 La. 319, 30 So. 883.

<sup>41</sup> *Groff v. Ramsey*, 19 Minn. 44; *Stocking v. St. Paul Trust Co.* 39 Minn. 410; *Windom v. Brown*, 65 Minn. 394, 67 N. W. 1028; *Smith v. Carrington*, 4 Cranch (U. S.) 62; *Sebree v. Dorr*, 9 Wheat. (U. S.) 558; *De Lane v. Moore*, 14 How. (U. S.) 253; *Edward v. Noyes*, 65 N. Y. 125; *Lampe v. Kennedy*, 56 Wis. 249.

<sup>42</sup> *Bigelow v. Young*, 30 Ga. 121; *White v. Dwinel*, 33 Me. 320; *Bird v. Bird*, 40 Me. 392; *Elwell v. Cunningham*, 74 Me. 127; *Camden v. Belgrade*, 78 Me. 204; *Smith v. Easton*, 54 Md. 138; *Weiler v. Monroe Co.* 74 Miss. 682; *Atwell v. Lynch*, 39 Mo. 519; *Stevens v. Equitable Mfg. Co.* 67 S. W. 1041,

29 Tex. Civ. App. 168; *Zollman v. Farr*, 93 Mo. App. 234; *Howley v. Whipple*, 48 N. H. 487; *United States v. Babcock*, 3 Dillon (U. S.) 576. See *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614; *Putnam v. Wadley*, 40 Ill. 346.

<sup>43</sup> *Gunther v. Bennett*, 72 Md. 384, 19 Atl. 1048.

<sup>44</sup> *Weatherhead v. Baskerville*, 11 How. (U. S.) 829; *Reynolds v. Jourdan*, 6 Cal. 108; *Owen v. Paul*, 16 Ala. 130; *Hanna v. Price*, 23 Ala. 826; *Willard v. Hall*, 24 Ala. 209; *Kimball v. Morrell*, 4 Me. (4 Greenl.) 368; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; *Gould v. Trowbridge*, 32 Mo. 291; *Downing v. Pickering*, 15 N. H. 344; *Lomerson v. Hoffman*, 24 N. J. L. 674; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Baskin v. Seechrist*, 6 Pa. St. 154; *Stone v. Thomas*, 12 Pa. St. 209; *Stockdale v. Young*, 3 Strobb. (S. Car.) 501.

by the evidence that the original had an existence as a genuine instrument.<sup>45</sup> And it must also appear in some way that the document or writing would be evidence if produced.<sup>46</sup> But where proof of the execution of the original would not be required if produced, it is held that such proof need not be made where the original is shown to be lost or destroyed. This, however, does not dispense with the necessity of showing its existence and genuineness.<sup>47</sup>

**§ 1459. Search.**—The proof of loss alone is not sufficient to justify the admission of secondary evidence, as the fact of the loss, as a rule, is not established without proof of a diligent search where the document or paper is most likely to be found. Therefore, the proof that the document or paper is lost and cannot be produced must be followed by proof establishing the fact of a diligent search; and it is not, ordinarily, sufficient that witnesses state that a search was made, but the particular character of the search must be shown.<sup>48</sup> The court should be informed by one having personal knowledge of the facts as to the extent of the search and of whom inquiries were made, in order to be able to pass intelligently upon the question of the use of diligence in the search.<sup>49</sup>

<sup>45</sup> *United States v. Paul Shearman (The)*, 1 Pet. (U. S.) 98; *New York Dry Dock v. Hicks*, 5 McLean (U. S.) 111; *Stebbins v. Duncan*, 108 U. S. 32; *Elliott v. Dyche*, 80 Ala. 376; *Echols v. Hubbard*, 90 Ala. 309, 7 So. 817; *Bruns v. Clase*, 9 Colo. 225; *Kelsey v. Hanmer*, 18 Conn. 311; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Doe d. Vaughn v. Biggers*, 6 Ga. 188; *Smith v. Smith*, 106 Ga. 303; *Garbutt Lumber Co. v. Gress Lumber Co.* 111 Ga. 821; *Crummey v. Bentley*, 114 Ga. 752; *Palmer v. Logan*, 4 Ill. 56; *McNutt v. McNutt*, 116 Ind. 545; *Helton v. Asher*, 103 Ky. 730, 46 S. W. 22; *Marks v. Winter*, 19 La. Ann. 445; *White v. Dwinel*, 33 Me. 320; *Brashears v. State*, 58 Md. 568; *Gunther v. Bennett*, 72 Md. 385, 19 Atl. 1048; *Stocking v. St. Paul, &c. R. Co.* 39 Minn. 410; *Martin v. Williams*, 42 Miss. 210; *Attwell v. Lynch*, 39 Mo. 519; *Shea v. Seelig*, 89 Mo. App. 146; *Yollman v.*

*Tarr*, 93 Mo. App. 234; *Fisher v. Carroll*, 6 Ired. Eq. (N. Car.) 485; *Rollins v. Henry*, 78 N. Car. 342; *Lofstin v. Loftin*, 96 N. Car. 94, 1 S. E. 837; *Gillis v. Wilmington, &c. R. Co.* 108 N. Car. 441, 13 S. E. 11; *Caufman v. Cedar Springs Cong.* 6 Bin. (Pa.) 59; *Anders v. Central R. Co.* 19 Pa. Sup. Ct. 564; *Doe d. Clark v. Trapaud*, 1 Stark. 281; *Gillis v. Smither*, 2 Stark. 528; 1 Starkie Ev. 340.

<sup>46</sup> *Street v. Kelly*, 67 Ala. 478; *Street v. Nelson*, 67 Ala. 504; *Peck v. Valentine*, 94 N. Y. 569.

<sup>47</sup> *Palmer v. Logan*, 4 Ill. 56; *Goodier v. Lake*, 1 Atk. 446 (519); 1 Starkie Ev. 335, n. 2.

<sup>48</sup> *Calhoun v. Thompson*, 56 Ala. 166; *Bogan v. McCutchen*, 48 Ala. 493; *Donegan v. Wade*, 70 Ala. 501; *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

<sup>49</sup> *Smith v. Coker*, 110 Ga. 650, 36 S. E. 105.

Mere evidence of some search is not sufficient; it must be a bona fide and diligent search.<sup>50</sup> But it has been held to be sufficient if it appears that the party offering the secondary evidence has done all that could be reasonably expected of him under the circumstances of the case in searching for the original instrument.<sup>51</sup> The rule laid down by Mr. Greenleaf, and followed by many cases, is that the predicate for the admission of secondary evidence of a lost paper requires that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found; and that the party has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.<sup>52</sup>

The rule as otherwise stated is that the party must show that he had in good faith and with reasonable diligence exhausted in his search all the sources of information and means of discovery which the nature of the case naturally suggests, and which are accessible to him; in other words, that there must be diligent search at every place the paper would be likely to be found.<sup>53</sup> It must appear that

<sup>50</sup> Folsom v. Scott, 6 Cal. 560.

<sup>51</sup> Kelsey v. Hanmer, 18 Conn. 311; Waller v. Eleventh School Dist. 22 Conn. 326; Elwell v. Mer-sick, 50 Conn. 272.

<sup>52</sup> Folsom v. Scott, 6 Cal. 460; Kelsay v. Hanmer, 18 Conn. 310; Harper v. Scott, 12 Ga. 125; Mar-iner v. Saunders, 5 Gilm. (Ill.) 117; Rankin v. Crow, 19 Ill. 629; John-son v. Mathews, 5 Kans. 118; Bar-ons v. Brown, 25 Kans. 410; Chi-cago, &c. R. Co. v. Brown, 44 Kans. 384, 24 Pac. 497; Powell v. Wallace, 44 Kans. 656, 25 Pac. 42; Rullman v. Barr, 54 Kans. 643, 39 Pac. 179; Roberts v. Dixon, 50 Kans. 436, 31 Pac. 1083; Cochran v. Cochran, 46 La. Ann. 536, 15 So. 57; State v. Mathis, 106 La. Ann. 263, 30 So. 834; Wing v. Abbott, 28 Me. 367; Hanson v. Kelley, 38 Me. 456; Glenn v. Rogers, 3 Md. 312; Carr v. Carr, 36 Mo. 408; Wills v. Mc-Dole, 2 South. (N. J.) 572; Fox v.

Lambson, 3 Halst. (N. J. L.) 339; Johnson v. Arnwine, 42 N. J. L. 451; Sussex Co. &c. Ins. Co. v. Woodruff, 26 N. J. L. 541; Kear-ney v. Mayor, &c. 92 N. Y. 617; Harmon v. Decker, 41 Ore. 587, 68 Pac. 11, 1111; Wiseman v. North-ern Pac. R. Co. 20 Ore. 25, 26 Pac. 272, 23 Am. St. 135; Smith v. Cox, 9 Ore. 327; Parks v. Dunkle, 3 Watts & S. (Pa.) 291; American, &c. Ins. Co. v. Rosenagle, 77 Pa. St. 507; Whitesides v. Watkins (Tenn.), 58 S. W. 1107; Thrall v. Todd, 34 Vt. 97; Doe v. Lewis, 15 Jur. 512, 5 Eng. L. & Eq. 400; Gath-ercole v. Miall, 15 L. J. Ex. 179; Rex v. Morton, 4 M. & S. 48; Rex v. Castleton, 6 T. R. 236; Thomp-son v. Travis, 8 Scott, 85; Simp-son v. Dall, 3 Wall. (U. S.) 460; 1 Starkie Ev. §§ 336-340.

<sup>53</sup> Singer Mfg. Co. v. Riley, 80 Ala. 314; Jernigan v. State, 81 Ala. 58, 1 So. 72; King v. Scheuer, 105



bona fide and diligent search had been unsuccessfully made for the original document where it was most likely to be found, or the loss must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced if such person be living.<sup>54</sup>

**§ 1460. Search—Illinois rule.**—The rule as early laid down by an Illinois court, and as adhered to in subsequent cases, is stated as follows: "When from the ownership, nature or objects of a paper it has properly a particular place of deposit, or where from the evidence it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness, proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend, in a great degree, upon circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined. But this need not always be done when from the extent of the archives or office it would be impracticable, and the order in which it is kept a more limited examination is equally satisfactory. In all cases the search must be made in the utmost good faith, and should be as thorough and vigilant as, if the paper were not found, its benefits would be lost. On the whole, the court must be satisfied that the paper is destroyed or cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found. Nor must he produce every man upon the stand into whose hands rumor alone may have traced it, for if the inquiry is only suggested by hearsay, it may be answered by hearsay. If, on the other hand, legal testimony shows it to have been in a particular place, or if the natural and legitimate presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there."<sup>55</sup>

Ala. 558, 16 So. 923; Groff v. Ramsey, 19 Minn. 44; Stocking v. St. Paul Trust Co. 39 Minn. 410, 40 N. W. 365; Windom v. Brown, 65 Minn. 394, 67 N. W. 1028; Baldwin v. Burt, 43 Neb. 245, 61 N. W. 601; Buchanan v. Wise, 34 Neb. 695, 52 N. W. 163; Minor v. Tillotson, 7 Pet. (U. S.) 99; Proprietors of Braintree v. Battles, 6 Vt. 399;

Sperry v. Wesco, 26 Ore. 483, 38 Pac. 623; Harmon v. Decker, 41 Ore. 587, 68 Pac. 1116.

<sup>54</sup> Murray v. Buchanan, 7 Blackf. (Ind.) 549; Meek v. Spencer, 8 Ind. 118; Frazee v. State, 58 Ind. 8; Newton v. Donnelly, 5 Ind. App. 359, 36 N. E. 769.

<sup>55</sup> Mariner v. Saunders, 10 Ill. (5 Gilm.) 113; Dickinson v. Breeden,

§ 1461. **Search—Oregon rule.**—"The degree of diligence, in any case, which shall be considered necessary will depend upon the character and importance of the document or paper, the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be expected to be found. If the document were a valuable and important one which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost."<sup>56</sup>

§ 1462. **Search—Proof of details.**—There is one class of cases or line of decisions to the effect that it is not sufficient for a witness to state in general terms that he had made search, or that he had made a diligent and bona fide search for the instrument. This would in effect be giving a mere conclusion; and the witness must state the facts as to the search. What he did and where he looked, the places searched, considering the nature of the document, and the like, in order that the court may determine whether or not the search was diligent and made in good faith.<sup>57</sup> But there are other cases holding that in certain events it is not necessary to give the details of the search. Where it is provided by statute that a certain affi-

25 Ill. 186; Doyle v. Wiley, 15 Ill. 576; Rankin v. Crow, 19 Ill. 626; Hanson v. Armstrong, 22 Ill. 445; Pardee v. Lindley, 31 Ill. 184; Huls v. Kimball, 52 Ill. 394; Chicago, &c. R. Co. v. Ingersoll, 65 Ill. 404; Scott v. Bassett, 174 Ill. 390, 51 N. E. 577; Lundberg v. Mackenheuser, 4 Ill. App. 605; Whitehall v. Smith, 24 Ill. 166; Owen v. Thomas, 33 Ill. 320. See, also, Simpson v. Doll, 3 Wall. (U. S.) 461; Chapin v. Taft, 18 Pick. (Mass.) 379; Woods v. Gassett, 11 N. H. 242; Johnson v. Arnwine, 42 N. J. L. 451; Phillips Ev. § 456.

<sup>56</sup> Wiseman v. Northern Pac. R. Co. 20 Ore. 425, 26 Pac. 272. See, also, American, &c. Ins. Co. v. Rosenagle, 77 Pa. St. 507; Smith v. Cox, 9 Ore. 327; Kelsey v. Hanmer, 18 Conn. 310; Post v. School Dist. No. 10, 19 Neb. 135, 26 N. W. 911; Johnson v. Arnwine, 42 N. J. L. 451; Parks v. Dunkle, 3 Watts & S. (Pa.) 291. See § 1463.

<sup>57</sup> Shepherd v. Pratt, 16 Kans. 209; Booth v. Cook, 20 Ill. 129; Smith v. Coker, 110 Ga. 650, 36 S. E. 105.

davit may be made and filed as the predicate for the introduction of a certified copy of a record or paper, it is held not to be necessary to state the particular facts of the search.<sup>58</sup> But the rule requiring that the particular acts and the details of the search be given would seem, upon principle, to apply to all cases where it is sought to give parol evidence of the contents of a lost document or writing, although it would not, perhaps, be fatal error to admit such evidence, especially when there is nothing indicating bad faith, or the like, upon proof of the due execution and loss of the document and somewhat general evidence that a diligent but unsuccessful search has been made in good faith in the place where the document was likely to be.

**§ 1463. Search—Importance of document.**—In accounting for the loss of the original, there must be a showing that diligence has been used to regain its possession, and that notwithstanding the exercise of such diligence, it was not in the power of the party to obtain or produce it. But the degree of diligence may vary with the circumstances of the different cases and with the value and importance of the document alleged to be lost. The rule, as it has been stated, is that the degree of diligence required is always proportionate to the value and importance of the instrument supposed to be lost.<sup>59</sup> It has been held that the sufficiency or weight of the evidence of loss is to be determined, at least to a great extent, by a consideration of the character of the document, the length of time which has elapsed since it was last seen, the proper place of its deposit, and the habits of its custodian as to preserving other papers.<sup>60</sup>

**§ 1464. Search—In proper place.**—Where it is made to appear by the preliminary proofs that a paper or document was usually kept at or had its proper place, it would generally be sufficient to show a diligent search in that particular place, as otherwise a search

<sup>58</sup> *Foot v. Silliman*, 77 Tex. 268, 13 S. W. 1032; *Mariner v. Saunders*, 10 Ill. (5 Gilm.) 123; *Newson v. Luster*, 13 Ill. 175; *Bowman v. Wettig*, 39 Ill. 416.

<sup>59</sup> *Waller v. Eleventh School Dist.* 22 Conn. 333; *Crawford v. Hodge*, 81 Ga. 728, 8 S. E. 208; *Union Banking Co. v. Gittings*, 45 Md. 181; *Wright v. State*, 88 Md. 436, 41 Atl. 795; *Burt v. Long*, 106 Mich. 210, 64 N. W. 60; *Davis v. Teachout*,

126 Mich. 135, 85 N. W. 475; *Doe v. McCaleb*, 3 Miss. (2 How.) 756; *Page v. State*, 59 Miss. 474; *Gillis v. Wilmington, &c. R. Co.* 108 N. Car. 441, 13 S. E. 11, 1049; *Wiseman v. Northern Pac. R. Co.* 20 Ore. 425, 26 Pac. 272; *American &c. Ins. Co. v. Rosenagle*, 77 Pa. St. 507; *Gully v. Bishop of Exeter*, 4 Bing. N. Cas. 290; *Gathercole v. Miall*, 15 M. & W. 335.

<sup>60</sup> *Page v. State*, 59 Miss. 474.

might be interminable, and in such matters the law requires nothing unreasonable. Hence, as a general rule, where it is shown that careful or diligent but unsuccessful search for a document or paper has been made in the place where it belongs and is generally kept or is most likely to be found, it is sufficient to admit secondary evidence of its contents.<sup>61</sup> The rule is also stated thus: "Proof of a diligent and bona fide search for a document or writing in the place where it belongs, is generally kept, and is most likely to be found, sufficiently accounts for its loss and properly permits secondary proof of its contents."<sup>62</sup> And it has been held a sufficient predicate for secondary evidence where a witness states that a document or writing is lost, and that he had made diligent search for it in the proper place.<sup>63</sup>

<sup>61</sup> *Pierce v. Wallace*, 18 Cal. 165; *Hobson v. Porter*, 2 Colo. 28; *Hittson v. Davenport*, 4 Colo. 169; *Wells v. Adams*, 7 Colo. 26; *Bruns v. Clase*, 9 Colo. 225; *Billin v. Henkel*, 9 Colo. 394; *Brevoort v. Hughes*, 10 Colo. App. 379, 50 Pac. 1050; *Edwards v. Rives*, 35 Fla. 89, 17 So. 416; *Sutton v. McLoud*, 26 Ga. 638; *Lott v. Buck*, 113 Ga. 640, 39 S. E. 70; *Acme Brewing Co. v. Central R. Co.* 115 Ga. 494, 42 S. E. 8; *Bestor v. Powell*, 2 Gilm. (Ill.) 119; *Dugger v. Oglesby*, 99 Ill. 405; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 56 N. E. 63; *Petrue v. Wakem*, 99 Ill. App. 463; *Langsdale v. Woollen*, 99 Ind. 575; *Curme v. Rauh*, 100 Ind. 247; *Hill v. Aultman*, 68 Iowa, 630, 27 N. W. 788; *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9; *Hammond v. Ludden*, 47 Me. 447; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905; *Leland v. Cameron*, 31 N. Y. 115; *Mandeville v. Reynolds*, 68 N. Y. 528; *Graff v. Pittsburgh, &c. R. Co.* 31 Pa. St. 489; *State v. Cooper (Tenn. Ch.)*, 53 S.

W. 391; *Vandergriff v. Piercy*, 59 Tex. 271.

<sup>62</sup> *Jernigan v. State*, 81 Ala. 58, 1 So. 72; *Hobson v. Porter*, 2 Colo. 28; *Hittson v. Davenport*, 4 Colo. 169; *Bruns v. Clase*, 9 Colo. 225; *Billin v. Henkel*, 9 Colo. 394; *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579; *Leland v. Cameron*, 31 N. Y. 115.

<sup>63</sup> *Tanner v. Hall*, 89 Ala. 628, 7 So. 187; *Crook v. Webb*, 125 Ala. 457, 28 So. 384; *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555; *Hamilton v. Maxwell*, 133 Ala. 633, 32 So. 13; *Coffing v. Carnahan*, 122 Ind. 427, 23 N. E. 855; *Howe v. Fleming*, 123 Ind. 262, 24 N. E. 238; *Douglass v. Wolf*, 6 Kans. 88; *Dickerson v. Talbot*, 53 Ky. (14 B. Mon.) 60; *Deerfield Tp. v. Harper*, 115 Mich. 678, 74 N. W. 207; *Board of Education v. Moore*, 17 Minn. 412; *Henry v. Diviney*, 101 Mo. 378, 13 S. W. 1057; *Meyers v. Russell*, 52 Mo. 26; *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328; *Mandeville v. Reynolds*, 68 N. Y. 528; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376; *McKesson v. Smart*, 108 N. Car. 17, 13 S. E. 96; *Braintree v. Battles*, 6 Vt. 395.

The Supreme Court of Indiana has laid down the rule that where a paper which the law requires to be filed and kept by a public officer as part of the records or papers of his office is alleged to be lost, before receiving secondary evidence of its contents the court may require that careful and diligent search be made in the office by one so fully acquainted with the office records and papers as to make it probable that if the paper was in the office he would find it.<sup>64</sup>

**§ 1465. Search—Place—Presumption of loss.**—Where papers or documents are required by law to be kept on deposit at a particular office, if such paper is not found on proper search in the particular place, the presumption will ordinarily be that it is lost or destroyed.<sup>65</sup> But, as already stated, the court, before receiving parol evidence of the contents of such a document, has a right to require that it be shown that diligent search was made in such office by such a person and under such circumstances as to render it probable that if the paper was in the office it would have been found.

**§ 1466. Search—In probable place.**—Where the document or writing is not required to be kept in some particular place, but where it is made to appear that it was last seen or known to be at a particular place, then it should be shown that a careful search was made where it was last known to be, or where it was most likely to be found.<sup>66</sup> The proof should show that search was made in probable places of deposit.<sup>67</sup>

<sup>64</sup> *Howe v. Fleming*, 123 Ind. 262, 24 N. E. 238.

<sup>65</sup> *Mandeville v. Reynolds*, 68 N. Y. 528; *Rex v. Stourbridge*, 8 B. & C. 96; *Teall v. Van Wyck*, 10 Barb. N. Y. 376; *Leland v. Cameron*, 31 N. Y. 115; *McKesson v. Smart*, 108 N. Car. 17, 13 S. E. 96.

<sup>66</sup> *Foster v. State*, 88 Ala. 182, 7 So. 185; *Anniston, &c. Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61; *Stuart v. Mitchum*, 135 Ala. 546, 33 So. 670; *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473; *Brevoort v. Hughes*, 10 Colo. App. 379, 50 Pac. 1050; *Palmer v. Logan*, 4 Ill. 56; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Blakely Printing Co. v. Pease*, 95 Ill. App. 341; *Howe Mach.*

*Co. v. Stiles*, 53 Iowa, 424, 5 N. W. 577; *Ware v. Howley*, 68 Iowa, 633, 27 N. W. 788; *Hatch v. Carpenter*, 9 Gray (Mass.) 271; *Thomson v. Flint, &c. R. Co.* 131 Mich. 95, 90 N. W. 1037; *Brinkman v. Luhrs*, 60 Mo. App. 512; *Post v. School Dist. No. 10*, 19 Neb. 135, 26 N. W. 911; *Downing v. Pickering*, 15 N. H. 344; *McManus v. Commow*, 10 N. Dak. 340; *Walker v. Peterson* (Tex. Civ. App.), 33 S. W. 269; *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102.

<sup>67</sup> *Harmon v. Decker*, 41 Ore. 587, 68 Pac. 11, 1111; *Anderson v. Mabery*, 58 Tenn. (2 Heisk.) 653; *Rogers v. Durant*, 106 U. S. 644, 1 Sup. Ct. 623.

§ 1467. **Search — Proper custodian.**—In making the proof of search and of the degree of diligence used the law does not require that it shall be interminable, but it does require that the search shall be reasonable. So it holds, as already seen, that search must be made in proper places; it is also the rule that the search or the proof of search must be made by the proper person. For example, the existence, loss, or non-existence of records kept by a person by authority of law is best proved by that person himself. It has been held, therefore, not to be sufficient to prove by a clerk, either that a record does not exist or that it has been lost, as under their rules not only loss but search must be shown by the custodian.<sup>68</sup> While this is, perhaps, going to the extreme, yet it is often said in general terms that before secondary evidence is admissible, the person who was the proper custodian of the document or paper should be produced and his evidence given as to the loss.<sup>69</sup>

The rule is also stated that it is generally sufficient to admit secondary evidence to show that search has been made in the proper place, and with the proper officer for a paper which is by law committed to a particular person, and that the paper cannot be found.<sup>70</sup> And where a document or paper is traced to a particular person, such person should be called as a witness to account for the instrument, and in such a case proof of search by other persons is not, ordinarily, sufficient.<sup>71</sup>

<sup>68</sup> *Edward v. Barwise*, 69 Tex. 84, 6 S. W. 677; *Rhodus v. Sansom*, (Tex.), 6 S. W. 849; *Bullock v. Wallingford*, 55 N. H. 619.

<sup>69</sup> *Brock v. Cottingham*, 23 Kans. 383; *Barons v. Brown*, 25 Kans. 410; *Bogan v. McCutchen*, 48 Ala. 493; *Brown v. Tucker*, 47 Ga. 485; *Hanson v. Kelly*, 38 Me. 456; *Apperson v. Ingham*, 12 Mo. 59; *Harper v. Hancock*, 6 Ired. L. (N. Car.) 124; *Tyre v. Magness*, 1 Sneed (Tenn.) 276; *Dunn v. Choate*, 4 Tex. 14; *Simpson v. Dall*, 70 U. S. (3 Wall.) 460; *Anderson v. Maberrey*, 2 Heisk. (Tenn.) 655; *Gordon v. McCall*, 20 Tex. Civ. App. 283; *Kearney v. Mayor, &c.* 92 N. Y. 617; *Dishaw v. Wadleigh*, 15 App. Div. (N. Y. 205; *Deaver v. Rice*, 2 Ired.

(N. Car.) 280; *Dickinson v. Breedon*, 25 Ill. 167; *Bunch v. Hurst*, 3 Desau. (S. Car.) 273; *Turner v. Yeates*, 16 How. (U. S.) 16; *Parkins v. Cobbet*, 1 Car. & P. 282; *Wiseman v. Northern Pac. R. Co.* 20 Ore. 425.

<sup>70</sup> *Proprietors of Braintree v. Battles*, 6 Vt. 395; *Williams v. Colbert Co.* 81 Ala. 216, 1 So. 74.

<sup>71</sup> *Parkins v. Cobbet*, 1 Car. & P. 282; *Brewster v. Sewell*, 3 B. & H. 296; *Freeman v. Askill*, 2 B. & C. 494; *Kelsey v. Hanmer*, 18 Conn. 311; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; *Florsheim v. Palmer*, 99 Ill. App. 559; *Moore v. Beattie*, 33 Vt. 219; *Doe d. Vaughn v. Biggers*, 4 Ga. 188; *Town of Royalton v. Royal-*

§ 1468. **Search—Proper custodian—Extent.**—The exact extent of the search by the proper custodian cannot always be measured, but in order to justify the admission of secondary evidence there should be such proof of search for the original by the proper custodian as would reasonably warrant the conclusion that it was either lost or destroyed, and that it cannot be found or produced. Secondary evidence cannot, ordinarily, be admitted where a witness is uncertain and admits that the document might be in his possession, as this implies that by a diligent search in the proper place it might be found, and it is an admission that the search he had made was neither thorough nor satisfactory to himself.<sup>72</sup> This rule is carried to the extent that the loss should be proved by the person in whose custody the document was at the time of the loss if he be living, and if dead, application should be made to his representatives, and search made among his papers.<sup>73</sup> But it has been held that parol evidence is admissible to prove the contents of a contract, where it was shown that it could not be found among the papers of the person entitled to its possession.<sup>74</sup>

Under this rule it was held that where a written agreement passed from the possession of a mutual custodian on his removal to another state, and on the death of the latter custodian the paper passed into the hands of a son-in-law, a diligent search among all the papers of the deceased was a sufficient proof of loss.<sup>75</sup> As a further illustration of the rule, it was held to be a sufficient showing of loss for the introduction of secondary evidence on proof that a diligent or unsuccessful search was made for the document or paper by the party in whose possession it was last shown to be.<sup>76</sup>

alton, &c. Tp. Co. 14 Vt. 311;  
Fletcher v. Jackson, 23 Vt. 581.

<sup>72</sup> Blondeau v. Sheridan, 81 Mo. 545.

<sup>73</sup> Vandergriff v. Piercy, 59 Tex. 372; Hill v. Taylor, 77 Tex. 295, 14 S. W. 366; Trimble v. Edwards, 84 Tex. 497, 19 S. W. 772; Baldwin v. Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Murphy v. Lyons, 19 Neb. 689, 28 N. W. 328; Birdsalle v. Carter, 5 Neb. 517; Nelson v. Central Land Co. 35 Minn. 408, 29 N. W. 121; Laird v. Kilbourne, 70 Iowa, 83, 30 N. W. 9; Viles v. Moulton, 11 Vt. 470; Town of Royalton

v. Royalton, &c. Co. 14 Vt. 311; Fletcher v. Jackson, 23 Vt. 581; Glenn v. Rogers, 3 Md. 312; Dinn v. Choate, 4 Tex. 14; Adkins v. Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; Howard v. Galbraith (Tex. Civ. App.), 30 S. W. 689.

<sup>74</sup> Watson v. Richardson, 110 Iowa, 673, 80 N. W. 407.

<sup>75</sup> Kaufman v. Congregation, &c. 6 Bin. (Pa.) 59; Page v. Page, 15 Pick. (Mass.) 368; Bagley v. McMickle, 9 Cal. 430.

<sup>76</sup> Gordon v. McCall, 20 Tex. Civ. App. 283.

§ 1469. **When custodian is out of state—Sufficient.**—Where it is made to appear by the proof that the original document or writing is in the hands of the third person who is beyond the jurisdiction of the court or out of the state, it then becomes a question as to what degree of diligence the party must use to obtain the production of the document, and as to what showing he should make before he is permitted to give secondary evidence of its contents. The adjudicated cases on this subject are not in harmony; but it is possible that in some degree the inconsistency may be accounted for in the application of the rule to cases differing in principle. The rule laid down and adhered to by many cases in its general application is that where it appears from the evidence that the original document or paper is in the possession of a third person beyond the jurisdiction of the court, or out of the state, that this is a sufficient predicate for the introduction of secondary evidence to prove the contents of the document.<sup>77</sup>

- <sup>77</sup> *Shepard v. Giddings*, 22 Conn. 282; *Elwell v. Mersick*, 50 Conn. 272; *Burton v. Driggs*, 20 Wall. (U. S.) 134; *Smith v. Armistead*, 7 Ala. 698; *Whilden v. Merchants', &c. Bank*, 64 Ala. 1; *Gordon v. Tweedy*, 74 Ala. 232; *Martin v. Brown*, 75 Ala. 442; *Young v. East Ala. R. Co.* 80 Ala. 100; *Manning v. Maroney*, 87 Ala. 563; *Alabama, &c. R. Co. v. Coskry*, 92 Ala. 254, 9 So. 202; *Memphis, &c. R. Co. v. Humbree*, 84 Ala. 182; *Gordon v. Searing*, 8 Cal. 49; *Owers v. Olathe, &c. Co.* 6 Colo. App. 1; *Brown v. Wood*, 19 Mo. 475; *Beattie v. Hilliard*, 55 N. H. 428; *Ralph v. Brown*, 3 W. & S. (Pa.) 395; *Lunday v. Thomas*, 26 Ga. 537; *Calhoun v. Calhoun*, 81 Ga. 91; *Schaefer v. Georgia R. Co.* 66 Ga. 39; *Shirley v. Hicks*, 105 Ga. 504; *Miller v. McKennon*, 103 Ga. 553; *De Baril v. Pardo* (Pa.), 8 Atl. 876. See *Doe d. Vaughn v. Biggers*, 4 Ga. 188, *Bailey v. Johnson*, 9 Cow. (N. Y.) 115; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58; *Eaton v. Campbell*, 7 Pick. (Mass.) 10; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376; *Boone v. Dykes*, 3 Mon. (Ky.) 532; *Woods v. Burke*, 67 Mich. 674, 35 N. W. 798; *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123; *Hagaman v. Gillis*, 9 S. Dak. 61, 68 N. W. 192; *Dwyer v. Salt Lake, &c. Co.* 14 Utah, 339, 47 Pac. 311; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *Eaton v. Campbell*, 7 Pick. (Mass.) 10; *Carpenter v. Bailey*, 56 N. H. 283; *Beattie v. Hilliard*, 55 N. H. 428; *Burnham v. Wood*, 8 N. H. 334; *Grogan v. United States &c. Ins. Co.* 90 Hun (N. Y.) 521; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Otto v. Trump*, 115 Pa. St. 425; *Ralph v. Brown*, 3 W. & S. (Pa.) 395; *Rhodes v. Seibert*, 2 Pa. St. 18; *Smith v. Traders' Nat'l Bank*, 82 Tex. 368; *McBride v. Willis*, 82 Tex. 141; *Veck v. Holt*, 71 Tex. 715; *Harvey v. Edens*, 69 Tex. 420; *Dwyer v. Salt Lake City, &c. Co.* 14 Utah, 339.



The third person in whose custody the original is shown to be, must be a person not connected with the action as a party and not under the control as agent or otherwise of any party to the action. Under this rule it was held that where the books of a corporation had been taken beyond the jurisdiction of the court, and a certified copy of one of the records was lost, parol evidence of the resignation of an officer was properly admitted.<sup>78</sup>

When it is shown that a third person is the custodian of a paper or document and such person cannot be compelled to produce it, the rule as to diligent search will be relaxed, but enough should be shown to reasonably satisfy the court that the paper is not voluntarily withheld by the party offering to prove it.<sup>79</sup>

**§ 1470. When custodian is out of state—Insufficient.**—To the cases holding that a mere showing that the original document in the hands of a third person out of the state is alone sufficient to justify the admission of secondary evidence of its contents, there stands opposed a line of respectable decisions holding that mere absence from the state of the custodian, who is a third party, is not sufficient in the absence of some showing of an attempt made to procure the document. In some of the cases, without any discussion of the subject, it is simply stated that where the original document or paper is in the possession of the third person who is beyond the jurisdiction of the court, and reasonable diligence has been used to procure it without effect, then secondary evidence as to its contents may be resorted to.<sup>80</sup> The Supreme Court of Oregon has expressly held that the mere proof to the effect that the original document or paper is in the hands of the person beyond the jurisdiction of the court, is not sufficient to justify the introduction of secondary evidence of its contents in the absence of a reasonable effort by the party offering to prove its contents.<sup>81</sup> And this is the rule in many states.<sup>82</sup>

<sup>78</sup> Jackson v. Clifford, 5 App. Cas. (D. C.) 312.

<sup>79</sup> Mordecai v. Beal, 8 Port. (Ala.) 529; Shields v. Byrd, 15 Ala. 818; Laster v. Blackwell, 128 Ala. 143, 30 So. 663; Kreuger v. Walker, 80 Iowa, 733, 45 N. W. 871; McNichols v. Wilson, 42 Iowa, 385; Olleman v. Kelgore, 52 Iowa, 38, 2 N. W. 612; Hall v. Cardell, 111 Iowa, 206, 82 N. W. 503.

<sup>80</sup> United States v. Rayburn, 6 Pet. (U. S.) 352; Minor v. Tillotson, 7 Pet. (U. S.) 99; Bailey v. Johnson, 9 Cow. (N. Y.) 115; Mordecai v. Beal, 8 Port. (Ala.) 529; Scott v. Rives, 1 Stew. & P. (Ala.) 19; Moore v. Beattie, 33 Vt. 219.

<sup>81</sup> Boswick v. Miller, 21 Ore. 25, 26 Pac. 861.

<sup>82</sup> Bishop v. American, &c. Co. 157 Ill. 284, 41 N. E. 765; Dickinson v.

In New York it was held that where the custodian of the original document is out of the state, his deposition should be taken or some good excuse given for not doing so.<sup>83</sup> By examination it will be seen that most of the decisions holding that proof of possession of the document by a person living in another state is sufficient to admit secondary evidence of its contents in the absence of any showing of an effort to produce the document do not apply to the following classes of cases: First, to cases where a defendant relies upon the document or paper to relieve himself from some liability. Second, where the action or defense is founded upon the document or writing claimed to be so held. Third, where both the execution and contents of the document or paper are denied. In all these classes, under what seems to be the better reasoned decisions, it should be shown that an effort was made to obtain the original, or cause its production at the trial, or to take the deposition of its custodian.<sup>84</sup> While the rule is that when an original paper in the hands of a person cannot be reached by the process of the court, it may be as much beyond the party's power to compel its production as though the instrument were lost or destroyed, and therefore its contents can be proved by parol in a proper case without notice to produce, yet this rule does not ordinarily apply where there is privity between the other party and the custodian of the paper; in such case the instrument is deemed to be under the control of the adverse party and notice to produce is necessary in order to admit secondary evidence of its contents.<sup>85</sup> And it has been held that where it is

Breedon, 25 Ill. 186; McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607; Waite v. High, 96 Iowa, 742, 65 N. W. 397; Shaw v. Mason, 10 Kans. 184; Deitz v. Regnier, 27 Kans. 94; Knowlton v. Knowlton, 84 Me. 283; People v. Seaman, 107 Mich. 348, 65 N. W. 203; Phillips v. United States Ben. Soc. 125 Mich. 186, 84 N. W. 57; Wood v. Cullen, 13 Minn. 394; Farrell v. Brennan, 32 Mo. 328; Kirchner v. Laughlin, 6 N. Mex. 300; Threadgill v. White, 33 N. Car. (11 Ired.) 591; Robards v. McLean, 30 N. Car. (8 Ired.) 522; Deaver v. Rice, 24 N. Car. (2 Ired.) 280; McCracken v. McCreary, 50 N. Car.

399; Casey v. Williams, 51 N. Car. (6 Jones) 578; Wiseman v. Northern Pac. R. Co. 20 Ore. 425; Beirne v. Rosser, 26 Gratt. (Va.) 537.

<sup>83</sup> Karney v. Mayor, &c. 92 N. Y. 617. See, also, Turner v. Yeates, 16 How. (U. S.) 14.

<sup>84</sup> Wiseman v. Northern Pac. R. Co. 20 Ore. 425, 26 Pac. 272; Turner v. Yates, 16 How. (U. S.) 14; Dickinson v. Breedon, 25 Ill. 167; Wood v. Cullen, 13 Minn. 394; McGregor v. Montgomery, 4 Pa. St. 237; Boswick v. Miller, 21 Ore. p. 25, 26 Pa. 861.

<sup>85</sup> Murray v. Mattison, 67 Vt. 553; 2 Phillips Ev. § 521.

made to appear that the party could produce the original, although in a foreign state secondary evidence will not be admitted.<sup>86</sup>

But it is the rule that when the original is in the hands of a third person who is beyond the jurisdiction of the court and he refuses to surrender it, secondary evidence is usually admissible.<sup>87</sup> And some courts hold that when the document cannot be produced by subpoena, secondary evidence is admissible.<sup>89</sup>

With the facilities which now prevail throughout all the states of the Union for the taking of depositions, common prudence on the part of counsel would suggest the expediency of obtaining the deposition of the custodian of an important original document, especially where no correct or certified copy is at hand.

**§ 1471. Custodian out of state—Proof of contents.**—The court having no power to compel a person living beyond its jurisdiction to surrender the possession of documents or writings, will therefore lend a ready ear to proof of their contents. The presumption of fraud which arises from a party withholding original documents is fully overcome when the proof shows that such document is beyond the power both of the party and of the court. In such cases the law favors a liberal rule in respect to the admission of secondary evidence. The custodian cannot be compelled to attend at the trial and produce the document; neither can he be compelled to attach the original to his deposition and thereby surrender it, when it may be of vast interest and of great value to him for other and different purposes. The most that can be asked or required is that the custodian furnish a copy with his deposition, and the power requiring this is generally limited to the willingness of the custodian. A witness is not always obliged to furnish copies of documents or letters at the mere call of a party to an action who hopes to reap some benefit from their production. In a leading case on this sub-

<sup>86</sup> *Prior v. North Texas, &c. Bank* (Tex. Civ. App.); 29 S. W. 84; *Sayward v. Gardner*, 5 Wash. 247.

<sup>87</sup> *Bishop v. Am. &c. Co.* 157 Ill. 284; *Fisher v. Green*, 95 Ill. 94; *Thom v. Wilson*, 27 Ind. 370; *Bullis v. Easton*, 96 Iowa, 513; *State v. Sterling*, 41 La. 679; *Binney v. Russell*, 109 Mass. 55; *Williamson v. Cambridge R. Co.* 144 Mass. 148; *Thompson-Houston E. Co. v. Pal-*

*mer*, 52 Minn. 174; *Brown v. Wood*, 19 Mo. 475; *Forrest v. Same*, 6 Duer (N. Y.) 102; *Maxwell v. Hoffheimer*, 81 Hun (N. Y.) 551; *Wisconsin, &c. Co. v. Walker*, 48 Wis. 614.

<sup>89</sup> *Holthausen v. Pondir*, 55 N. Y. Sup. Ct. 73. Letters outside of jurisdiction are "lost" under California Code. *Zellerbach v. Allenberg*, 99 Cal. 57.

ject it was held that a witness could not be compelled to attach copies of his private letters to his deposition; but the most that could be required of him was to furnish extracts from letters received by him relating to the subject of inquiry, and that he must be paid for doing this.<sup>90</sup>

In an earlier case it was held that a clerk was not bound to make extracts from a merchant's books, compare them with the originals and attach them to his deposition.<sup>91</sup> If the witness refuse to surrender the original or make copies and attach to his deposition, then secondary proof of the contents of the document becomes admissible in a proper case. In one case, where the original was beyond the court's jurisdiction, a witness who had seen the document was permitted to give oral testimony of its contents.<sup>92</sup> In another similar case it was held that a notarial copy of a contract was admissible.<sup>93</sup>

§ 1472. **Custodian's admission of loss—Sufficiency.**—The object of the rule requiring strict proof of loss and diligence of search, is to prevent a party to the action from perpetrating a fraud on his adversary by withholding the documents and writings, which, if produced, would not support his contention and would reveal the fraudulent design. So, where the adverse party admits that the document is lost, there is no longer any reason for the rule and no other accounting for its loss is required. Nor is it necessary to give notice to produce the original. So, if the proper custodian of a paper or document, or the attorney of a party admits its loss, no other accounting or diligence is required.<sup>94</sup> So, it was held unnecessary to give notice to produce a paper where the party testified that it was not in his possession and that he had never received it.<sup>95</sup> The execution of a deed shown to have been destroyed by fire is sufficiently established by the admission of the grantor, and from the fact that he made no claim to the lands described in the deed.<sup>96</sup>

<sup>90</sup> *Amherst Bank v. Conkey*, 45 Mass. (4 Met.) p. 459.

<sup>91</sup> *Savage v. Birkhead*, 20 Pick. (Mass.) 173.

<sup>92</sup> *United States v. Reyburn*, 6 Pet. (U. S.) 352.

<sup>93</sup> *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58; *Bailey v. Johnson*, 9 Cow. (N. Y.) 115.

<sup>94</sup> *Rex v. Haworth*, 4 Car. & P. 254;

*Doe v. Spitty*, 3 Barn. & A. 182; *Foster v. Pointer*, 9 Car. & P. 718;

*Howe v. Hall*, 14 East 276; *Cooper v. Maddan*, 6 Ala. 431; *Rhode v. McLean*, 101 Ill. 467; *Shortz v. Unangst*, 3 W. & S. (Pa.) 45.

<sup>95</sup> *Roberts v. Spencer*, 123 Mass. 397.

<sup>96</sup> *Elliott v. Dycke*, 78 Ala. 150; *Elliott v. Dycke*, 80 Ala. 376.

And it was held that the execution of a deed was sufficiently proved by admissions of the grantee, and that secondary evidence was admissible when the deed was traced to the possession of either of two executors, and was not produced on notice.<sup>97</sup>

**§ 1473. Custodian's admission of loss—Insufficient.**—Where the custodian admits that his search was not exhaustive, or that he is uncertain as to the whereabouts of the document, there is no sufficient predicate for the admission of secondary evidence. Thus the admission of the secretary of a corporation and that he was the custodian of letters and that he had produced all letters he had found passing between the parties of the action, was held insufficient to admit secondary evidence in the absence of a notice requiring the production of a particular letter. The reason given by the court in this case was that the evidence did not amount to an admission of the loss.<sup>98</sup>

**§ 1474. Voluntary destruction—By party.**—Under the rules already stated, the failure to produce an original document or writing usually raises a presumption of fraud, and this presumption must be met and overcome before secondary evidence of the contents of the absent document will be admitted. Hence, where it appears that such a document or writing has been purposely destroyed by the party who is supposedly the most interested in preserving it, this presumption of fraud is strengthened and the doctrine is now well established that where the original has been purposely and deliberately destroyed, or, perhaps, when lost by the negligence or laches of a party, or his attorney, that he will not be permitted to prove its contents by secondary evidence.<sup>99</sup> Mere proof of the destruction of an instrument will not, ordinarily, of itself admit secondary evidence of its contents, for if the instrument is voluntarily destroyed, the party thereby forfeits his right to prove its contents until he shows to the satisfaction of the court that it was done under a mistake, and

<sup>97</sup> *Fralich v. Cresley*, 29 Ark. 457, 65 Am. Dec. 413; *Whitford v. Lutin*, 25 E. C. L. 179, 10 Bing. N. Cas. 395; *Beckwith v. Benner*, 25 E. C. L. 595, 6 Car. & P. 681.

<sup>98</sup> *Burlington Lumber Co. v. The Whitebreast Coal, &c. Co.* 66 Iowa, 292, 23 N. W. 674.

<sup>99</sup> *Livingston v. Rogers*, 2 Johns.

*Cas. (N. Y.)* 488; *Blade v. Noland*, 12 Wend. (N. Y.) 173; *Riggs v. Taloe*, 9 Wheat. (U. S.) 483; *Bagley v. McMickle*, 9 Cal. 430; *Davis v. Teachout*, 126 Mich. 135; *Bank, &c. v. Sill*, 5 Conn. 106. See, also, *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339.

not until every inference of fraud is met and repelled.<sup>100</sup> So it is held that where the party himself destroys the document or paper under circumstances raising a strong presumption that it was deliberately done to furnish an excuse for the non-production of such document, the decision of the trial court refusing to admit secondary evidence would not be disturbed.<sup>101</sup> When a party attempts to account for the non-production of an instrument by proving its loss his adversary may prove that the party himself has purposely withheld or destroyed it, and if the point is satisfactorily established, every proper presumption will be indulged against him in reference to the character of the instrument.<sup>102</sup> But the voluntary destruction by a party of a document which he is interested in preserving, will not ordinarily be presumed in the absence of evidence to the contrary.<sup>103</sup>

**§ 1475. Voluntary destruction—California rule.**—On the question of the admissibility of secondary evidence of the contents of a document or writing in case of its loss or destruction, the rule is well stated in an early California case as follows: "It is not a matter of course to allow secondary evidence of the contents of an instrument in a suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made by the owner, or with his consent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence to which the facts sought, to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose or defeat. When it appears that this better evidence has been voluntarily

<sup>100</sup> Wyckoff v. Wyckoff, 16 N. J. Eq. 401; Riggs v. Tayloe, 9 Wheat. (U. S.) 483; Renner v. Bank, &c. 9 Wheat. (U. S.) 581; Blade v. No-

land, 12 Wend. (N. Y.) 173.  
<sup>101</sup> Mason v. Libbey, 90 N. Y. 683; West v. New York, &c. R. Co. 55 App. Div. (N. Y.) 464; Jackson v. Frier, 16 Johns. (N. Y.) 196.

<sup>102</sup> Life, &c. Ins. Co. v. Mechanics, &c. Ins. Co. 7 Wend. (N. Y.) 31; Thompson v. Thompson, 9 Ind. 323.

<sup>103</sup> See Foster v. Mackay, 7 Met. (Mass.) 531, 537; Clark v. Hornbeck, 17 N. J. Eq. 430.

and deliberately destroyed, the same presumption arises; and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases."<sup>104</sup> If the party satisfactorily shows that the destruction was by mistake and sufficiently frees himself from the imputation of evil design or fraudulent purpose, he may then make secondary proof of the contents of the instrument destroyed.<sup>105</sup>

<sup>104</sup> *Bagley v. McMickle*, 9 Cal. 430.

<sup>105</sup> *Old Nat. Bank v. Findley*, 131 Ind. 225, 31 N. E. 62. See, also, *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *United States v. Lyon*, 12 Pet. (U. S.) 1; *Anglo-American & Co. v. Cannon*, 31 Fed. 313; *Rodgers v. Crook*, 97 Ala. 722; *Bagley v. McMickle*, 9 Cal. 430; *Breen v. Richardson*, 6 Colo. 605; *Blake v. Fash*, 44 Ill. 302; *Palmer v. Goldsmith*, 15 Ill. App. 544; *Rudolph v. Lane*, 57 Ill. 115; *Baldwin v. Threlkeld*, 8 Ill. App. 312; *Tobin v. Shaw*, 45 Me. 331; *Joannes v. Bennett*, 5 Allen (Mass.) 169; *Smith v. Holyoke*, 112 Mass. 517; *People v. Sharp*, 53 Mich. 523; *Skinner v. Henderson*,

10 Mo. 205; *Schroeder v. Michel*, 98 Mo. 43; *Stephan v. Metzger*, 95 Mo. App. 609; *Price v. Tallman*, 1 N. J. L. 511; *Broadwell v. Stiles*, 8 N. J. L. 71; *Wyckoff v. Same*, 16 N. J. Eq. 401; *Blade v. Noland*, 12 Wend. (N. Y.) 173; *Steele v. Lord*, 70 N. Y. 280; *Deering v. Pearson*, 8 Misc. (N. Y.) 269; *Wallace v. Harmstad*, 44 Pa. St. 492; *Wilke v. Same*, 28 Wis. 296; *Cote v. Cantin*, 21 Quebec Super. Ct. 432.

Where the writing was destroyed when it was not evidence in the party's favor, and at the time of its destruction had no value, the rule does not apply. *Pollock v. Wilcox*, 68 N. Car. 46.

## CHAPTER LXXI.

### LOST INSTRUMENTS—PROOF OF CONTENTS.

Sec.	Sec.
1476. Contents—Proof.	1485. Certified copy—Original competent.
1477. Proof by copy.	1486. Examined copy.
1478. Copies—Classification.	1487. Office copy.
1479. Copy not admissible.	1488. Deeds—Proof of loss and contents—Illustrations.
1480. Proof by certified copy.	1489. Letters—Proof of contents.
1481. Copy of original.	1490. Various documents—Illustrations.
1482. Copy—Translation.	
1483. Proof by copy of copy.	
1484. Copy—Partial.	

§ 1476. **Contents—Proof.**—When the loss or destruction of the original document or writing is accounted for to the satisfaction of the court, the party then proceeds to prove its contents by secondary evidence. For this purpose, under the rule in most jurisdictions in this country, he must produce the best evidence obtainable;<sup>1</sup> but the evidence required for such purpose varies according to the circumstances of each particular case.<sup>2</sup> The evidence offered for such purpose should be sufficient to satisfy the mind of the judicial tribunal as to the terms of the instrument; no vague or uncertain recollection concerning its conditions or stipulations should supply the place of the writing itself. If the precise language of the instrument cannot be given, the substance of it should be proved satisfactorily.<sup>3</sup> The rule, however, is not so strict as to require a witness to give the exact language of an instrument, but it is suffi-

<sup>1</sup> *Taylor v. Riggs*, 1 Pet. (U. S.) 591.

<sup>2</sup> *Cochran v. Cochran*, 46 La. Ann. 536.

<sup>3</sup> *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487; *Richardson v. Robbins*, 124 Mass. 105.



cient if he can state the substance of the lost document.\* It is immaterial how the witness obtained his knowledge of the contents of the instrument except as it may go to the weight of his evidence.<sup>5</sup> Nor is it objectionable that the admission of parol evidence for such a purpose would often be attended with dangerous consequences, even in cases where the change of a single word might affect the validity of the instrument; these objections go to the weight and not to the competency of such evidence.<sup>6</sup> But the contents of the lost instrument cannot be proved by reading a copy to the witness and then asking him to state if the copy corresponds with his recollection of the original.<sup>7</sup>

§ 1477. **Proof by copy.**—A copy of a lost or destroyed instrument is generally regarded as better evidence of its contents than parol; and in proving the contents of an instrument when it appears that a copy is in existence, its production should usually be required. It is stated, as a rule, that it is only when the existence of better evidence is not disclosed that parol proof of the contents may be given.<sup>8</sup> When a copy is offered it is sufficient if the evidence shows that it is a correct copy of the original; and whether it is or not is a question for the jury.<sup>9</sup> In order to make the copy admissible, the law requires that the proof shall ordinarily be made by some witness who had compared it with the original.<sup>10</sup> But where it appeared that an instrument was lost, and the only copy was also shown to be lost, it was held competent to prove the con-

\**Tobin v. Shaw*, 45 Me. 331; *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652; *Commonwealth v. Roark*, 62 Mass. (8 Cush.) 210; *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663; *Everett v. Everett*, 41 Barb. (N. Y.) 385; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591.

<sup>5</sup> *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663. See, also, *Rex v. Hurley*, 2 M. & Rob. 473. But see *Russell v. Brosseau*, 65 Cal. 605.

<sup>6</sup> *Commonwealth v. Roark*, 62 Mass. (8 Cush.) 210.

<sup>7</sup> *Jacques v. Horton*, 76 Ala. 238; *Singer Mfg. Co. v. Riley*, 80 Ala. 314; *Gazett, In re*, 35 Minn. 532, 29 N. W. 347; *McGinnis v. Sawyer*, 63

Pa. St. 259. But it has been held that he may refresh his memory by an abstract made by himself, *Burton v. Diggs*, 20 Wall. (U. S.) 133; *Mayson v. Beasley*, 27 Miss. 106; *Sizer v. Burt*, 4 Dento (N. Y.) 426.

<sup>8</sup> *Higgins v. Reed*, 8 Iowa 298.

<sup>9</sup> *Burrill v. Wilcox Lbr. Co.*, 65 Mich. 571, 32 N. W. 824; *Oliver v. Persons*, 30 Ga. 391.

<sup>10</sup> *McGinnis v. Sawyer*, 63 Pa. St. 259; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Teed v. Martin*, 4 Campbell 90; *Medlicott v. Joyner*, 1 Mod. 4; *Reid v. Margeson*, 1 Campb. 469; *Butterick v. Allen*, 8 Mass. 273. See *Wharton Ev.* § 94.

tents of the lost copy by one who had seen it, as this was regarded as the best evidence of which the case was susceptible.<sup>11</sup>

Independent of all statutory rule, it is said, every document of a public nature which the public or a party has the right to inspect, and in the removal of which there would or might be an inconvenience, may be proved by copy.<sup>12</sup>

So copies of pleadings in another case, when the originals which are competent evidence are lost, are admissible in evidence in a pending action, even in the absence of indorsements showing the date and fact of filing.<sup>13</sup> And when the original document or paper consists of a notice served upon the party, a copy of such notice made at the same time is original primary evidence, and is admissible to prove the contents of the original.<sup>14</sup> But where it appeared that one of two copies only of a notice was lost, and no notice had been given to produce the other, which had been served on and delivered to the defendant, parol proof was held not admissible to prove the contents.<sup>15</sup> And the loss of a certified copy of a judgment of a foreign state has been held not to be a sufficient predicate for parol proof of its contents where it does not appear that the record of the original judgment itself was either lost or destroyed.<sup>16</sup> So a copy of an entry in a Family Bible, showing the date of the birth of a person or a party, is not admissible without accounting for the non-production of the original.<sup>17</sup>

**§ 1478. Copies—Classification.**—The contents of all records may be proved in two ways: (1) by the production of the original; (2) by a copy. In order to render a copy of a record or document admissible in evidence, certain formalities are essential for the purpose of establishing the fact that it is a true and correct copy. Courts will not place themselves at the mercy of litigants to the extent of admitting in evidence any paper which an interested party

<sup>11</sup> *Kelly v. Cargill Elevator Co.* Township of Republic, 65 Mich. 7 N. Dak. 343, 75 N. W. 264; *Joslyn v. Brockwell*, 13 N. Y. Supp. 311.

<sup>12</sup> *Simmons v. Spratt*, 20 Fla. 495; *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868; *Greenleaf Ev.* § 484; *Gresly Ev.* § 115.

<sup>13</sup> *Ponder v. Cheevers*, 104 Ala. 308, 16 So. 145.

<sup>14</sup> *Michigan Land, &c. Co. v.*

*Township of Republic*, 65 Mich. 628, 32 N. W. 882.

<sup>15</sup> *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212.

<sup>16</sup> *Kentzler v. Kentzler*, 3 Wash. 166, 28 Pac. 370.

<sup>17</sup> *Ryerson v. Grover*, 1 N. J. L. 523; *Curtis v. Patton*, 6 S. & R. (Pa.) 135; *Doe v. Perkins*, 3 Term R. 749.

might represent as a copy of some public or official document.<sup>18</sup> Before the contents of such pretended copy can be admitted in evidence it must be proved to the satisfaction of the court that it is what it is represented to be. Under the earlier English practice there were four methods by which copies of public records and documents could be so proved or established as to render them admissible in evidence: (1) by exemplification; (2) sworn or examined copies; (3) copies made by an officer authorized for that particular purpose; (4) by office copy.<sup>19</sup> This division is also designated by some law writers as follows: (1) exemplification under the court seal; (2) exemplifications under the seal of the particular court where the record remains; (3) examined copy; (4) office copies.<sup>20</sup> All of these methods were adopted in the early English practice, but some of them have never been carried into the practice in this country.<sup>21</sup> As elsewhere shown, the admissibility of copies of public records and documents is governed almost entirely by statute in this country, but it is conceded that the common law methods have not been abolished. In this country there are three recognized methods of making proof by copy: (1) exemplification by the proper custodian, attested by the seal of the state or government; (2) exemplification by the clerk or prothonotary of a court attested by its seal and by the certificate of the judge, chief justice or presiding magistrate; (3) by a sworn or examined copy, which is still recognized as the common law method.

**§ 1479. Copy not admissible.**—Under the general rule requiring the best testimony within the power of the party to be produced, copies of written agreements of a more private nature, not required by law to be recorded are only secondary evidence, and therefore not admissible in the absence of a statute to the contrary, unless the proof shows that the originals are destroyed or are in the possession of the opposite party or beyond the jurisdiction of the court and under the control of the party desiring to use them. Under this rule it was held that the mere fact that private writings had been filed in one court of the state was not sufficient to authorize the use of copies of such writings to be used as evidence in a suit pending in another court of the same state. The admission of

<sup>18</sup> *Devling v. Williams*, 9 Watts (Pa.) 311.

<sup>19</sup> *Starkie Ev.* p. 257; *Buller N. P.* p. 227.

<sup>20</sup> 3 *Taylor Ev.* § 1535.

<sup>21</sup> 1 *Wharton Ev.* §§ 95, 105.

such copies in evidence would, it was said, be extending the principle in relation to secondary evidence further than the reason of the rule would authorize it to be carried.<sup>22</sup> A copy of a document or written instrument is never admissible in evidence, as a general rule, until it is made to appear by the proof that the production of the instrument is out of the party's power, for the reason that the instrument itself is always regarded as the primary or best possible evidence of both its existence and contents, and all evidence which shows upon its face that there is better evidence behind it is secondary and incompetent.<sup>23</sup> Thus, a copy of a deed was properly excluded where it appeared that the original was in existence and no effort had been made to have it produced at the trial of the case.<sup>24</sup>

**§ 1480. Proof by certified copy.**—In practically all of the states of the Union, and by comity of the states, statutes provide that copies of records required by law to be kept, duly certified by the proper and legal custodian, are admissible in evidence to prove the contents without producing the originals or in any manner accounting for their absence.<sup>25</sup> But, notwithstanding such statutes, it is the rule that a certified copy of an instrument improperly admitted to record is not admissible to prove the contents of the original in the absence of a showing of loss or of proper diligence to account for its absence.<sup>26</sup> And, in some states, before a certified copy of a deed is admissible in evidence, it must be established that the original could not be produced by the exercise of reasonable diligence.<sup>27</sup>

**§ 1481. Copy of original.**—An officer cannot make a certified copy of the original document deposited with him for record competent

<sup>22</sup> Davidson v. Davidson, 49 Ky. (10 Mon.) 115; Knight v. Knight, 12 La. Ann. 396; Lawrence v. Grout, 12 La. Ann. 835.

<sup>23</sup> Sebree v. Dorr, 9 Wheat. (U. S.) 558; Hart v. Yunt, 1 Watts (Pa.) 253; United States v. Gilbert, 2 Sumn. (U. S.) 19; Putnam v. Goodall, 31 N. H. (11 Fost.) 419; 1 Greenleaf Ev. § 84, and n.; 1 Phillips Ev. 421; Phillips Ev. (Am. Ed.) 440, 441.

<sup>24</sup> Bird v. Bird, 40 Me. 392; Robinson v. Bealle, 20 Ga. 275; Cloud

v. Hartridge, 28 Ga. 272; Torrey v. Fuller, 1 Mass. 524.

<sup>25</sup> See 24 Am. & Eng. Ency. of Law, (2d ed.) 198, 200, 203. See § 1340, et seq.

<sup>26</sup> Crayton v. Munger, 11 Tex. 234; Butler v. Dunagan, 19 Tex. 566; Hooper v. Hall, 30 Tex. 158; Hill v. Taylor, 77 Tex. 295, 14 S. W. 366; Bounds v. Little, 79 Tex. 128, 15 S. W. 225.

<sup>27</sup> Crafts v. Dougherty, 69 Tex. 477, 6 S. W. 850.

evidence He must record the instrument and then certify a copy of the record.<sup>28</sup>

§ 1482. **Copy—Translation.**—A translation of a document is admissible in evidence, it is said, only when the original could be given without proof of its execution.<sup>29</sup>

§ 1483. **Proof by copy of copy.**—The general rule is that a copy of a copy is not admissible in evidence, but the rule must be understood and properly limited. It applies to cases where the copy is taken from a copy when the original is still in existence and is capable of being compared with it; or where it is a copy of a copy of a record, the record being in existence, and by law deemed as high evidence as the original. But the rule is different when applied to cases of secondary evidence where the original is lost, or the record of it is not deemed in law as high evidence as the original, or where the copy of a copy is the highest proof in existence. In such a case when it is shown by the proof that the copy offered is a correct copy of a correct copy, and the original and the first copy are lost or cannot be produced, then such copy of a copy is clearly admissible as being the best evidence in existence, and under the rule in many states is regarded as better than parol evidence of the contents of the original. The rule is also applied where two copies are made of an original document, and when one copy is verified by comparison with the original and the other copy verified by comparison with the first copy; in such case each is regarded as a true copy of the original.<sup>30</sup>

A copy of a copy is sufficient when the first copy is equivalent to the original.<sup>31</sup>

§ 1484. **Copy—Partial.**—Records and documents are usually

<sup>28</sup> Hatchet v. Conner, 30 Tex. 104.

<sup>29</sup> Houston v. Perry, 3 Tex. 393; Hatchett v. Conner, 30 Tex. 104.

<sup>30</sup> Winn v. Patterson, 9 Pet. (U. S.) 663; Kelly v. Cargill Ele. Co., 7 N. Dak. 343; Stetson v. Gulliver, 56 Mass. (2 Cush.) 494; Cameron v. Peck, 37 Conn. 555; Sternburg v. Callahan, 14 Iowa, 251; Drumm v. Cessnum, 58 Kans. 331, 49 Pac. 78; Perkins v. Bard, 16 La. Ann. 443; Smith v. Lindsey, 89 Mo. 76, 1 S. W. 88; Howard v. Quattle-

baum, 46 S. Car. 95; Dunlap v. Berry, 5 Ill. 326; Fowler v. Hoffman, 31 Mich. 215; Gregory v. McPherson, 13 Cal. 562; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 71b. Kelly v. Cargill & Co. (N. Dak.), 75 N. W. 264.

<sup>31</sup> Commonwealth v. Corkery, 175 Mass. 460, 56 N. E. 711; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143. Or when the original copy is an ancient document.

voluminous, and in many cases are continuous and embrace a variety of subjects without change or break. To require a complete copy in such cases would be both unreasonable and unnecessary. In such cases the law very wisely requires a certified copy only of so much of the record as relates to the subject matter of the action wherein such copy is to be used as evidence. Nothing more can be required, nor can it be necessary to enable the court and jury to determine the rights of the parties.<sup>32</sup> But it has been said that there should generally be an entire copy of the proceedings of a particular meeting, or anything done and transacted at a particular time.<sup>33</sup>

In some jurisdictions it is held that a separate certificate must be made to each copy, and that it is not sufficient to certify to a number of copies on separate pieces of paper, but fastened together.<sup>34</sup> But the same court subsequently held that copies of court records in a transcript which must of necessity be fastened together in some way could be followed by a single certificate.<sup>35</sup> The certificate should state that the person so certifying is the keeper of the records, or the legal custodian of the document,<sup>36</sup> or contain words of similar import.

**§ 1485. Certified copy—Original competent.**—The rule requiring the best evidence has been relaxed in the case of public records and documents, and by statutory enactment duly authenticated copies of these are now universally received in evidence. However, this is simply a rule of convenience, and does not render the original itself incompetent. So in all cases where it is provided that certified copies may be received in evidence to prove the contents of original documents, the originals themselves are still competent evidence, and may be used as such.<sup>37</sup>

<sup>32</sup> Woods v. Banks, 14 N. H. 101; Whitehouse v. Bickford, 29 N. H. 471; Morrill v. Foster, 33 N. H. 379; Goulding v. Clarke, 34 N. H. 148.

<sup>33</sup> Woods v. Banks, 14 N. H. 101; Whitehouse v. Bickford, 29 N. H. 471; Morrill v. Foster, 33 N. H. 379; Vance v. Reardon, 2 Nott & M. (S. Car.) 299; Jay v. East Liv-  
ermore, 56 Me. 107.

<sup>34</sup> Newell v. Smith, 38 Wis. 39;

Susquehanna, &c. R. Co. v. Quick, 68 Pa. St. 189.

<sup>35</sup> Sherburne v. Rodman, 51 Wis. 474, 8 N. W. 414.

<sup>36</sup> Thompson v. Mason, 4 Ill. App. 452.

<sup>37</sup> Lawson v. Orear, 4 Ala. 156; Carwile v. House, 6 Ala. 710; Gray v. Davis, 27 Conn. 447; Dobbs v. Justices, 17 Ga. 624; Britton v. State, 54 Ind. 535; Iles v. Watson, 76 Ind. 359; Anderson v. Acker-

Even a copy may be the original when made so by statute.<sup>38</sup>

§ 1486. **Examined copy.**—In England and in some jurisdictions in this country contents of public records and documents may be proved by examined copies. This applies to every document of a public nature, the removal of which would be attended with inconvenience, and to all such documents which the party has the right to inspect.<sup>39</sup> As defined by one of the old law writers, "An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original."<sup>40</sup> Another law author states it as a rule that "the contents of any record of a judicial court, and all entries in any other public books or registers, may be proved by an examined copy." This exception extends to all records and entries of a public nature, in books required by law to be kept.<sup>41</sup> Whenever the book or document belongs to the class of public writings which are denominated in law official registers, the contents may be proved by an examined copy duly made and sworn to by a competent witness.<sup>42</sup> To make such copy competent evidence the witnesses must understand the character and language of the document, and must state that it is an exact or sworn copy.<sup>43</sup> And legal evidence of the examination must be produced, the witness or witnesses giving testimony under the sanction of an oath with opportunity for cross-examination as to the existence of the record and the accuracy of the copy.<sup>44</sup> And he must also have read the whole of it.<sup>45</sup> The earlier cases hold that where the examined copy is made by one person reading the

man, 88 Ind. 481; Reed v. Arnold, 10 Kans. 102; Vose v. Manly, 19 Me. 331; Folsom v. Cressey, 73 Me. 270; Brooks v. Daniels, 39 Mass. (22 Pick.) 498; Carolina Iron Co. v. Abernathy, 94 N. Car. 545; State v. Voight, 90 N. Car. 741; Short v. Currie, 53 N. Car. 42; Cate v. Nutter, 24 N. H. 108; King v. Kenney, 4 Ohio, 79; Miller v. Hale, 26 Pa. St. 432; Ballinger Nat'l Bank v. Bryan (Tex.), 34 S. W. 451; Bruce v. Manchester, &c. R. Co. 19 Fed. 342; Day v. Moore, 13 Gray (Mass.) 522; Knox v. Silloway, 10

Me. 201; Sawyer v. Garcelon, 63 Me. 25.

<sup>38</sup>Commonwealth v. Corkery, 175 Mass. 460, 56 N. E. 711.

<sup>39</sup>York v. Gregg, 9 Tex. 85.

<sup>40</sup>Best Ev. § 846.

<sup>41</sup>Greenleaf Ev. § 91 (563f).

<sup>42</sup>Cooper v. Armstrong, 4 Kans. 30; York v. Gregg, 9 Texas, 85.

<sup>43</sup>Crawford Peerage Case, 2 H. L. Cas. 544; Brown v. Hicks, 1 Ark. 232; Cooper v. Armstrong, 4 Kans. 30.

<sup>44</sup>Dibble v. Morris, 26 Conn. 416.

<sup>45</sup>Nelthrop v. Johnson, Clayt. 142.

original and the other holding the copy, it is unnecessary to call both persons as witnesses, and it need not be proved that they alternately read and inspected the original and the copy.<sup>46</sup> But it is not sufficient as an examined copy where the witness testifies that he compared the copy produced with a certified copy of the original.<sup>47</sup> In a more recent House of Lords case it was held necessary to show that the copy was made by changing hands.<sup>48</sup> The same rule was adopted by the United States court in an early case.<sup>49</sup> Some jurisdictions hold that statutes authorizing the admission of certified copies of public documents are cumulative and do not exclude examined copies, verified by the evidence of a competent witness admissible under the rules of the common law.<sup>50</sup> Other courts recognize it as well settled that where the proof is by a copy, an examined copy duly made and sworn to is always admissible.<sup>51</sup>

§ 1487. **Office copy.**—An office copy is said to be “a copy made by an officer of the court, bound by law to make it, and is equivalent to an exemplification.”<sup>52</sup> “A copy made by an officer of the court, who is authorized to make it by a rule of court, but not required by law to make it, is regarded as equivalent to an exemplification in the same cause and court, but in other causes or courts it is not admissible unless it can be proved as an examined copy.”<sup>53</sup> An early English writer on this subject says: “Here a

<sup>46</sup> *Lynde v. Judd*, 3 Day (Conn.) 499; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116; *Hill v. Packard*, 5 Wend. (N. Y.) 375; *Harvey v. Cummings*, 68 Tex. 599, 5 S. W. 513; *Lasater v. Van Hook*, 77 Tex. 650, 14 S. W. 270; *Spaulding v. Vincent*, 24 Vt. 501; *Catlin v. Underhill*, 4 McLean (U. S.) 199; *Reid v. Margison*, 1 Campb. 469; *Giles v. Hill*, 1 Campb. 471; *Fyson v. Kemp*, 6 C. & P. 71; *McNeil v. Perchard*, 1 Esp. 264; *Reg. v. McDonald*, Arm. M. & O. 112; *Crawford Peerage Case*, 2 H. L. Cas. 534; *Rolf v. Dart*, 2 Taunt. 52; *Best Ev.* § 846; *Taylor Ev.* §§ 1379, 1389; 1 *Wharton Ev.* §§ 89, et seq. 819, 824.

<sup>47</sup> *Holloway v. McIlhenny*, 77 Tex.

657, 14 S. W. 240; *Lasater v. Van Hook*, 77 Tex. 650, 14 S. W. 270.

<sup>48</sup> *Slane Peerage Case*, 5 Cl. & F. 42; *Best Ev.* § 486.

<sup>49</sup> *United States v. Johns*, 4 Dall. (U. S.) 412.

<sup>50</sup> *Blackman v. Dowling*, 57 Ala. 78; *Atwood v. Winterport*, 60 Me. 250; *State v. Lynde*, 77 Me. 561, 1 Atl. 687.

<sup>51</sup> *Lyon v. Bolling*, 14 Ala. 753; *Pierce v. Rehfuß*, 35 Mich. 53; *Whitehouse v. Bickford*, 29 N. H. 471; *American, &c. Ins. Co. v. Rosenagie*, 77 Pa. St. 507; *Otto v. Trump*, 115 Pa. St. 425, 8 Atl. 786; *Spaulding v. Vincent*, 24 Vt. 501.

<sup>52</sup> *Stephen Dig. of Ev. art.* 77; *Bouvier Law Dict.* p. 540.

<sup>53</sup> *Stephen Dig. of Ev. art.* 78.



difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined.”<sup>54</sup> In speaking of this Mr. Wharton says: “An office copy of a record is a copy made by an officer duly authorized for that purpose, either by rule of court or by a statute. Such copy, when the officer is authorized only by rule of court, is admissible as evidence in the same court and in the same cause; but, at common law, the copy must be proved to be correct, if it be produced, either in another court, or even in the same court in another cause.”<sup>55</sup> Mr. Taylor says: “By an ‘office copy’ is meant a copy authenticated by a person intrusted with the power of furnishing copies. It is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded, even at common law, when tendered as evidence in the same court and in the same cause, as equivalent to the record itself.”<sup>56</sup> Where the document is under the control of a person not within the jurisdiction of the court a sworn copy is competent.”<sup>57</sup>

**§ 1488. Deeds—Proof of loss and contents—Illustrations.**—To justify the admission of parol evidence to prove the contents of a lost deed, under the decisions, especially when such proof is exclusively by parol, the following facts must usually be established to the satisfaction of the court: (1) the existence and execution of the original paper as a genuine document; (2) the substance of its contents; (3) its loss or destruction; and (4) absence from the state; or (5) some other satisfactory reason for failure to produce the original. The court, in the cases cited, emphasizes the fact that it is as necessary to prove any one of these elements as another, and that the failure to prove either is fatal to the right to intro-

<sup>54</sup> Buller N. P. 229.

<sup>55</sup> 1 Wharton Ev. § 104.

<sup>56</sup> Den d. Lucas v. Fulford, 2 Burr. 1179; Burnand v. Nerot, 1 Car. & P. 578; Rex v. Jolliffe, 4 T. R. 285; Pitcher v. King, 1 C. & K. 655; Highfield v. Peake 1 M. & M. 109; Appleton v. Lord Braybrook, 6 M. & S. 34; Black v. Lord Braybrook, 2 Stark. 7; Jack v.

Kiernan, 2 Jebb. & Sy. 231; Elwell v. Cunningham, 74 Me. 127; Little v. Paddleford, 13 N. H. 167; Kellogg v. Kellogg, 6 Barb. 116; Warren v. Wade, 52 N. Car. 494; Petermans v. Laws, 6 Leigh (Va.) 523 ; 1 Roscoe N. P. Ev. 97; Starke Ev. 260; Taylor Ev. § 1538.

<sup>57</sup> Hall v. Bishop, 78 Ind. 370. See Thom v. Wilson, 27 Ind. 370

duce the secondary evidence.<sup>58</sup> To lay the foundation for the admission of a copy of a deed, where it is shown that the residence of the grantee who has possession of the deed is known, it has been held necessary that his deposition should be taken to prove its existence, its loss, and his search for the same in good faith.<sup>59</sup>

Before secondary evidence can be admitted, the party must account for the non-production of the originals by showing that they are not within his power. In case of deeds, this is usually sufficiently done by proving that the custodian made diligent search for them, and they could not be found.<sup>60</sup> So, where a party offering a deed testified that he at one time had possession of the original but did not have it at the time of the trial, that he had made diligent search in the places where he kept his papers and in other places where he would be likely to find it, but that he did not find it and did not know where it was, this was held sufficient to justify the admission of secondary evidence.<sup>61</sup> Proof of loss of an original deed and destruction of the records has also been held sufficient to admit secondary evidence of its contents.<sup>62</sup> It is also said that the court would lend an easy ear to proof of loss of a registered instrument, or one that was not in the possession of the party or under his control, in order to render competent the introduction of a certified copy.<sup>63</sup>

<sup>58</sup> *Potts v. Coleman*, 86 Ala. 94; *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 So. 561. But a grantee named in a deed, who was its custodian at the time it was lost, has been held competent to prove its contents after showing its loss, without proof that he made a search for it, at least where it appears that a search would be unavailing. *Pastel v. Palmer*, 71 Iowa, 157, 32 N. W. 257.

<sup>59</sup> *Dickinson v. Breeden*, 25 Ill. 167.

<sup>60</sup> *Strain v. Murphy*, 49 Mo. 337; *Doe v. McCaleb*, 2 How. (Miss.) 756; *Henry v. Diviney*, 101 Mo. 378, 13 S. W. 1057.

<sup>61</sup> *Nashville, &c. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935;

*Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Thayer v. Barney*, 12 Minn. 502; *Henry v. Diviney*, 101 Mo. 378, 13 S. W. 1057; *Meyers v. Russell*, 52 Mo. 26; *Abel v. Strimple*, 31 Mo. App. 86; *McKesson v. Smart*, 108 N. Car. 17; *Smith v. Garriss*, 131 N. Car. 34; *Gillis v. Wilmington, O. & E. C. R. Co.* 108 N. Car. 441, 13 S. E. 1019; *Gathercole v. Miall*, 15 M. & W. 335; *Sperry v. Wesco*, 26 Ore. 483, 38 Pac. 623; 1 *Greenleaf Ev.* § 558; 1 *Starkie Ev.* 387; 2 *Phillips Ev.* (Cowan & Hill's Notes) 441.

<sup>62</sup> *Silva v. Rankin*, 80 Ga. 79, 4 S. E. 756.

<sup>63</sup> See *Parsons v. Wilson*, 2 Tenn. 261; *Sampson v. Marr*, 7 Baxt. (Tenn.) 486.

**§ 1489. Letters—Proof of contents.**—Where the evidence of a witness was taken by deposition out of the state and the witness refused to part with letters in her possession which were competent and material evidence, secondary evidence of the contents of such letters was held admissible, and copies attached to the deposition and certified by the officer taking the deposition to be true copies of the originals which were identified by the witness, were held to be sufficient proof of the contents of such letters.<sup>64</sup> So, secondary evidence of the contents of a letter addressed to the witness has been held admissible where the proof shows that the original was not in the possession or under the control of the witness, and that it was beyond the jurisdiction of the court.<sup>65</sup> But the contents of a letter cannot be proved by parol where it appears that the letter was present at a former trial and offered in evidence, in the absence of proof showing its loss, and that proper search for it had been made.<sup>66</sup> And a witness cannot testify to the contents of a letter without its production, or otherwise laying some foundation for the introduction of secondary evidence.<sup>67</sup>

A press letter book is not original but secondary evidence of the contents of letters, the letters themselves being the primary evidence.<sup>68</sup> So a letter press copy is not original or primary evidence and not admissible in evidence in the absence of notice to produce, or accounting for the original.<sup>69</sup>

**§ 1490. Various documents—Illustrations.**—Parol evidence of the existence of a rule of a railroad company, forbidding the coupling of cars by hand, is not admissible where the evidence shows that the rules are printed in book form and a copy has not been produced nor its absence accounted for.<sup>70</sup> Secondary evidence can-

<sup>64</sup> *Bullis v. Easton*, 96 Iowa, 513, 65 N. W. 395; *Watson v. Richardson*, 110 Iowa, 673; *Ruthven Bros. v. Clarke*, 109 Iowa, 25, 79 N. W. 454.

<sup>65</sup> *Miles v. Stevens*, 142 Mass. 571, 8 N. E. 428.

<sup>66</sup> *Perrin v. State*, 81 Wis. 135, 50 N. W. 516; *Newell v. Clapp*, 97 Wis. 104, 72 N. W. 366.

<sup>67</sup> *Rockwell, &c. Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180.

<sup>68</sup> *Watkins v. Paine*, 57 Ga. 50; *King v. Worthington*, 73 Ill. 161.

<sup>69</sup> *Burlington Lumber Co. v. Whitebreast Coal, &c. Co.* 66 Iowa, 292, 23 N. W. 674. See, also, *Foot v. Bentley*, 44 N. Y. 166; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Anglo-American &c. Co. v. Cannon*, 31 Fed. 313; Vol. I, § 208.

<sup>70</sup> *Georgia Pac. R. Co. v. Propst*, 90 Ala. 1; *Missouri Pac. R. Co. v. Lamothe*, 76 Tex. 219. See, also, *Cincinnati, &c. R. Co. v. McMullen*, 117 Ind. 440, 20 N. E. 287; *Grand Rapids, &c. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135.

not, it has been held, be received to prove a judgment rendered by a justice during a former term of office on mere proof of search in his office for his docket and papers.<sup>71</sup> Nor can the record of a contract creating a lien for the price of a water right be introduced in evidence without proof of the loss of the original, or otherwise accounting for its absence as this was held to be merely secondary evidence.<sup>72</sup> A certified copy of the record of an unacknowledged deed has been held inadmissible in evidence without accounting for the loss of the original and proof of its execution.<sup>73</sup> So, the rule admitting secondary evidence on a showing that the primary has been lost or destroyed, applies in case of a deposition lost or destroyed when it is made to appear that the witness is dead or resides out of the state.<sup>74</sup> And the contents of a lost ordinance may be proved by parol<sup>75</sup> upon laying the proper foundation. But a recorder's certificate is not sufficient proof of a copy of an instrument where the original was not properly entitled to record.<sup>76</sup>

In a case where it became necessary to prove the license of a physician, and where it was shown that the physician had removed to another state, and that the records of the office where the license was recorded had been destroyed, this was held a sufficient showing to admit secondary proof.<sup>77</sup> It has also been held that an endorsement on an execution shown to be lost may be proved by parol.<sup>78</sup> And where articles of apprenticeship were in the hands of an apprentice long after his time had expired as such, after he had married and had a family, and were not found, on proper search, among his papers after his death, it was held that this sufficiently accounted for the non-production, and was a sufficient showing to admit secondary evidence of its contents.<sup>79</sup> But it has been held that parol evidence cannot be given to prove the contents of a lost abstract, as this itself is but secondary evidence, and

<sup>71</sup> Roach v. Privett, 90 Ala. 391.

<sup>72</sup> Fresno Canal, &c. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

<sup>73</sup> Reynolds v. Campling, 23 Colo. 105, 46 Pac. 639.

<sup>74</sup> Low v. Peters, 36 Vt. 177; Burton v. Driggs, 20 Wall. (U. S.) 125; Harper v. Cook, 1 Car. & P. 139.

<sup>75</sup> Wells v. Pressy, 105 Mo. 164, 16 S. W. 670.

<sup>76</sup> Hoskinson v. Adkins, 77 Mo. 537; Boydston v. Morris, 71 Texas, 697; ante § 1480.

<sup>77</sup> Kilgore v. Stanley, 90 Ala. 523, 8 So. 130.

<sup>78</sup> Davidson v. Kahn, 119 Ala. 364, 24 So. 583.

<sup>79</sup> Kingwood v. Bethlehem, 13 N. J. L. 221.

proof of the loss of secondary evidence will not make parol proof of its contents admissible to prove the contents of the original document which constitutes the best evidence.<sup>80</sup> Other decisions upon the general subject of the admissibility of secondary evidence and the necessity and mode of laying the foundation therefor are cited below.<sup>81</sup>

The rule was applied to judgments and all judicial records by one court, where it said: "Whether a record be ancient or recent, after proof of its loss or destruction satisfactory to the court, its contents may be proved like any other document, by any secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence."<sup>82</sup>

<sup>80</sup> *Thatcher v. Olmstead*, 110 Ill. 26.

<sup>81</sup> *Bouldin v. Massie*, 7 Wheat. 122; *Butler v. Maples*, 9 Wall. 766; *Stebbins v. Duncan*, 108 U. S. 32; *Wiswall v. Knevals*, 18 Ala. 65; *Hussey v. Roquemore*, 27 Ala. 281; *Fralick v. Presley*, 29 Ala. 457; *Glassell v. Mason*, 32 Ala. 719; *Bogan v. McCutchen*, 48 Ala. 493; *Norris v. Russell*, 5 Cal. 249; *Hadley v. Beau*, 53 Ga. 685; *Poulet v. Johnson*, 25 Ga. 403; *Cameron v. Kersey*, 41 Ga. 41; *Hanson v. Armstrong*, 22 Ill. 442; *Fisk v. Kissane*, 42 Ill. 87; *Nixon v. Cobleigh*, 52 Ill. 387; *Johnson v. Mathews*, 5 Kans. 118; *Marks v. Winter*, 19 La. Ann. 445; *Boynton v. Rees*, 8 Pick. (Mass.) 329; *Brackett v. Evans*, 1 Cush. (Mass.) 79; *Doe v. McCaleb*, 2 How. (Miss.) 756; *Benton v. Craig*, 2 Mo. 198; *Morrill v. Foster*, 32 N. H. 358; *Brighton Bank v. Philbrick*, 40 N. H. 506; *Chambers v. Hunt*, 22 N. J. L. 552; *Cary v. Campbell*, 10 Johns. (N. Y.) 363; *Caufman v. Congregation*, 6 Binn. (Pa.) 59; *Redman v. Green*, 3 Ired. Eq. (N. Car.) 54; *Dumas v. Powell*, 3 Dev. L. (N. Car.) 103; *Reynolds v. Quattlebaum*, 2 Rich. (S. Car.) 140; *Ben v. Peete*, 2 Rand. (Va.) 539; *Dawson v.*

*Graves*, 4 Call (Va.) 127; *Lunsford v. Smith*, 12 Grat. (Va.) 554; *Rex v. Johnson*, 7 East, 66; *Doe v. Whitcomb*, 6 Exch. 601; *Brewster v. Sewell*, 3 B. & Ald. 296; *Pardoe v. Price*, 13 M. & W. 267.

<sup>82</sup> *Davies v. Pettit*, 11 Ark. 349 (367); *Mason v. Bull*, 26 Ark. 164; *Mitchell v. Conley*, 13 Ark. 414; *Taylor v. Cullum*, 2 Blackf. (Ind.) 228; *Donaldson v. Winter*, 1 Miller (La.) 137; *Newcomb v. Drummon*, 4 Leigh (Va.) 57; *Adams v. Betz*, 1 Watts (Pa.) 427; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; *Harris v. McRae*, 4 Ired. (N. Car.) 81; *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Schauber v. Jackson*, 2 Wend. (N. Y.) 14; *Mayor of Hull v. Homer*, 1 Cow. (N. Y.), 109; 1 *Greenleaf Ev.* (3rd ed.) p. 663, § 509; 1 *Starkie Ev.* 159; *Freeman Judgt.* § 407; *In re Warfield's Will*, 22 Cal. 51, 83 Am. Dec. 49; *Forsyth v. Vehmeyer*, 55 Ill. App. 223; *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55; *Bohart v. Hull*, 2 Ind. Ter. 45; *Higgins v. Reed*, 8 Iowa, 298; *Smith v. Brown*, 151 Mass. 338; *Cook v. Bertram*, 86 Mich. 356, 49 N. W. 42; *Martin v. Williams*, 42 Miss. 210; *Williams v. Cammack*, 27 Miss. 220; *Turner v. Thomas*,

Where the record of a judgment is lost or destroyed it is not necessary to institute proceedings to restore the record, before action, and parol proof of the contents of such record is competent in a proper case.<sup>83</sup>

77 Miss. 864, 28 So. 803; *In re Mil-lenooich's Estate*, 5 Nev. 161; *Mandeville v. Reynolds*, 68 N. Y. 528; *Leland v. Cameron*, 31 N. Y. 115; *United States v. Price*, 113 Fed. 851.

" *Forsyth v. Vehmeyer*, 55 Ill. App. 223; *Forsyth v. Vehmeyer*, 176

Ill. 359, 52 N. E. 55; *Ashley v. Johnson*, 74 Ill. 392; *Mandville v. Reynolds*, 68 N. Y. 528; *United States v. Price*, 113 Fed. 851; 1 *Greenleaf Ev.* § 509; *Freeman Judgt.* § 407; *Black Judgt.* § 969.

## CHAPTER LXXII.

### ALTERATION OF INSTRUMENTS.

Sec.		Sec.	
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1501.	Altered instrument admitted with explanation.	1514.	Expert and opinion evidence.
1502.	Instrument fair on its face—Burden of proof.	1515.	Transactions with persons since deceased.
1503.	Burden of proof and presumption where alteration is apparent—English rule.	1516.	Questions of law and fact—Province of court and jury.
1504.	Burden of proof and presumption where alteration	1517.	Weight and sufficiency of evidence—Inspection.

§ 1491. **Generally—Early doctrine repudiated.**—“As regards the proof of alterations in documents the cases are full of confusion.

Fragments of substantive law embrace the rules of evidence relating to this subject; and it is further intolerably perplexed by a quantity of jargon about presumptions and the burden of proof which often conceals the lack of any clear apprehension of the subject on the part of those who use it, and often disguises the true character of sound decisions."<sup>1</sup>

In an early and leading case upon the subject it was held that a deed is invalidated when it is altered in any material part, whether by the obligor or by a stranger, without the knowledge or privity of the obligee, no matter whether it be altered by interlineation, addition or erasure, or by the drawing of a pen over and through any material word; and it was also said in that case that "if the obligee himself alters the deed in any of said ways, although it is not material, yet the deed is void."<sup>2</sup> The same strict rule, with slight, if any, modification, was also applied to other contracts in early cases.<sup>3</sup>

But although there is conflict upon various phases of the general subject, the doctrine of these early cases has been repudiated in a great measure in England as well as in this country.<sup>4</sup> The modern cases, at least in this country, also make a distinction between the alteration and what may be called the spoliation of written instruments. And it is now generally held that the wrongful act of a stranger will not necessarily vitiate the contract as between the parties.<sup>5</sup> It is laid down as a general rule, however, even by modern

<sup>1</sup> Thayer Prelim. Treat. Ev. 527.

<sup>2</sup> Pigot's Case, 11 Coke, 26. It was also stated by Lord Coke that the deed was invalidated, even though the alteration was made before it was executed. Coke Litt. 225 b. But this probably never was the law.

<sup>3</sup> See *Master v. Miller*, 4 Term 320; 1 Smith L. C. \*857, and note; *Powell v. Divett*, 15 East 29; *Davidson v. Cooper*, 11 M. & W. 778, 13 M. & W. 343. See, also, *Arnold v. Jones*, 2 R. I. 345; *Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

<sup>4</sup> *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *United States v. Spalding*, 2 Mason (U. S.) 478; *Bigelow v.*

*Stilphen*, 35 Vt. 521; *Bellows v. Weeks*, 41 Vt. 590; *Ames v. Brown*, 22 Minn. 257. As to this general subject see notes in 86 Am. St. 80-134; 10 Am. Dec. 267-273; 1 Smith L. C. 1304-1316; 37 Am. R. 260; 4 Am. St. 25; 25 Am. R. 481-484; 17 Am. R. 97-106; 3 Taylor Ev. §§ 1828-1830.

<sup>5</sup> *John v. Hatfield*, 84 Ind. 75; *Clopton v. Elkin*, 49 Miss. 95; *Croft v. White*, 36 Miss. 455; *Fuller v. Green*, 64 Wis. 159; *Bigelow v. Stilphen*, 35 Vt. 521; *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *City of Orlando v. Gooding*, 34 Fla. 244, 15 So. 770; *Bellows v. Weeks*, 41 Vt. 590; *Fisher v. King*, 153 Pa. St. 3, 25 Atl. 1029; *Ames*



authorities, "that any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as a matter of evidence, when (purposely) made by any party to the contract, is an alteration thereof, unless all the parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not."<sup>6</sup>

Two reasons are generally given for the rule: (1) the identity of the instrument is destroyed, and to hold one under such circumstances would be to hold him to a contract to which he never agreed;<sup>7</sup> (2) on grounds of public policy, tampering with written instruments should be discountenanced, and no man should be permitted to commit fraud without running the risk of losing thereby.<sup>8</sup>

v. Brown, 22 Minn. 257; Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210, and cases cited; Lubbering v. Kohlbrecher, 22 Mo. 596; Lee v. Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412; Nichols v. Johnson, 10 Conn. 192; Boyd v. McConnel, 10 Humph. (Tenn.) 68; Hunt v. Gray, 35 N. J. L. 227, 10 Am. R. 232; Ford v. Ford, 7 Pick. (Mass.) 418; White v. Harris (S. Car.), 48 S. E. 41

<sup>6</sup> Daniel Neg. Inst. § 1373; Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65; Wood v. Steele, 6 Wall. (U. S.) 80; White Sewing Mach. Co. v. Saxon, 121 Ala. 399, 25 So. 784; Kilkelly v. Martin, 34 Wis. 525; Osgood v. Stevenson, 143 Mass. 399, 9 N. E. 825; Greenfield Bank v. Stowell, 123 Mass. 196, 25 Am. R. 67; Eckert v. Louis, 84 Ind. 99; Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 S. W. 468; Pelton v. San Jacinto Lumber Co. 113 Cal. 21, 45 Pac. 12; Newman v. King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. 705; Soaps

v. Eichberg, 42 Ill. App. 375; Owen v. Hall, 70 Md. 97, 16 Atl. 376; Hartley v. Corboy, 150 Pa. St. 23, 24 Atl. 295.

<sup>7</sup> See authorities cited in last note supra; also, Lee v. Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. 466; Sudler v. Collins, 2 Houst. (Del.) 538; Dobyns v. Rawley, 76 Va. 537; Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65; Taylor v. Acorn, 1 Indian Ter. 436, 45 S. W. 130; Montgomery v. Crossthwaite, 90 Ala. 553, 8 So. 498, 505.

<sup>8</sup> Master v. Miller, 4 Term 320; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Waterman v. Vose, 43 Me. 504; Foote v. Hambrick, 70 Miss. 157, 11 So. 567; Wood v. Steele, 6 Wall. (U. S.) 80; Humphreys v. Guillo, 13 N. H. 385, 38 Am. Dec. 499; Lee v. Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. 466. The reason for the rule is thus stated in the case of Kingan v. Silvers, 13 Ind. App. 80, 37 N. E. 413:

"A written instrument in the hands of an adverse party is easily susceptible of alteration to the

**§ 1492. Wrongful alteration may vitiate.**—When the alteration is material the identity of the contract is destroyed, and it is held that it is vitiated, even though the alteration may operate to the disadvantage of the wrongdoer or to the benefit of the other party.<sup>9</sup> Thus, changes in the date of the payment of a note or in the statement of the amount of interest to be paid, have been held material under this rule.<sup>10</sup>

So it has been held that even adding a new surety vitiates the note as to a surety who has already signed.<sup>11</sup>

injury of the maker. Many written contracts are negotiable, and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds, and of loss to innocent persons. The most effectual means of preserving the integrity of such instruments is the rule that a material alteration destroys the instrument, so that no recovery can be had upon it, either in its original or its altered condition. The object of the rule is to enjoin the highest care upon the holder, and to punish him with loss for his negligent and fraudulent conduct."

<sup>9</sup> *Montgomery v. Crossthwaite*, 90 Ala. 553, 8 So. 498, 504, 12 L. R. A. 140, 24 Am. St. 832; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and elaborate note; *Angle v. Northwestern, &c. Ins. Co.* 92 U. S. 330; *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. R. 67; *Draper v. Wood*, 112 Mass. 315, 17 Am. R. 92; *Brown v. Straw*, 6 Neb. 536, 29 Am. R. 369; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. R.

382; *Miller v. Finley*, 26 Mich. 249, 12 Am. R. 306; *Warrington v. Early*, 2 El. & Bl. 763; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. 18; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567; *National, &c. Bank v. Madden*, 114 N. Y. 280, 11 Am. St. 633; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. 371; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. 490; *Hartley v. Corboy*, 150 Pa. St. 23, 24 Atl. 295. See note, 71 Am. Dec. 369.

<sup>10</sup> *Brown v. Straw*, 6 Neb. 536, 29 Am. R. 369; *Coburn v. Webb*, 56 Ind. 96, 26 Am. R. 15; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984; *Sanders v. Bagwell*, 37 S. Car. 145; *First Nat'l Bank v. Hall*, 83 Iowa, 645, 50 N. W. 944.

<sup>11</sup> *Anderson v. Bellinger*, 87 Ala. 334, 6 So. 82; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and note; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Little Rock Trust Co. v. Martin*, 57 Ark. 277, 21 S. W. 468. See, also, *Hall v. McHenry*, 19 Iowa, 521, 87 Am. Dec. 451; *Bowers v. Briggs*, 20 Ind. 139; *Gardner v. Walsh*, 5 El. & Bl. 83, 89, 85 E. C. L. 82. But compare *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. R. 187.

§ 1493. **What alterations are material.**—An alteration is said to be material when if it had been made without consent of the party charged it would have affected his interest or varied his obligation in any way whatever.<sup>12</sup> In other words, where it is apparent that the alteration is to correct a mere clerical error and is of such a character as not to change the legal effect or operation of the instrument it is generally immaterial, but if it does operate to change the identity or effect of the instrument the alteration is generally material, and a very slight change may prevent the use of the document as an instrument of evidence or as the foundation of a legal claim.<sup>13</sup> As otherwise expressed, an alteration is material “if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke.”<sup>14</sup>

§ 1494. **Illustrations of material alterations.**—Alterations in the time, manner and place of payment have been held to be material.<sup>15</sup> So alterations in the date are generally material.<sup>16</sup> Changing names

<sup>12</sup>Steven. Dig. Ev. art. 89. See, also, notes in 17 Am. R. and 4 Am. St. 25.

<sup>13</sup>See *Little Rock Trust v. Martin*, 57 Ark. 277, 21 S. W. 468; *American Pub. Co. v. Fisher*, 10 Utah, 147, 37 Pac. 259; *Winkles v. Gunther*, 98 Ga. 472, 25 S. E. 527.

<sup>14</sup>*Mahoiwe Bank v. Douglass*, 31 Conn. 170, 181; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *Morrill v. Otis*, 12 N. H. 466; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 82. See, also, *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Oliver v. Hawley*, 5 Neb. 439; *Reeves v. Pierson*, 23 Hun (N. Y.) 185; *Dickerman v. Miner*, 43 Iowa, 508; *Payne v. Long*, 121 Ala. 385, 25 So. 780.

<sup>15</sup>*Winter v. Pool*, 100 Ala. 503, 14 So. 411; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. R. 722; *Baugh v. Anderson*, 91 Ga. 831, 18 S. E. 44; *Steinau v. Moody*, 100 Ga. 136, 28 S. E. 30; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and full note; *Stayner v. Joyce*,

120 Ind. 99, 22 N. E. 89; *Tidmarsh v. Grover*, 1 M. & S. 735; *Bank v. Lockwood*, 13 W. Va. 392, 31 Am. R. 768; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Darwin v. Rippey*, 63 N. Car. 318; *Wills v. Wilson*, 3 Ore. 308; *Townsend v. Star Wagon Co.* 10 Neb. 615, 35 Am. R. 493; *Whitesides v. Northern Bank*, 10 Bush (Ky.) 501, 19 Am. R. 74; *Wyman v. Yeomans*, 84 Ill. 403; *Long v. Moore*, 3 Esp. 155, note; *Alderson v. Langdale*, 3 B. & Ad. 660. See, also, *Stephens v. Graham*, 7 S. & R. (Pa.) 505; *Martendale v. Follet*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232; *Angle v. Northwestern, &c. Ins. Co.* 92 U. S. 330.

<sup>16</sup>*Newman v. King*, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. 705; *Wood v. Steele*, 6 Wall. (U. S.) 80; *Miller v. Gilleland*, 19 Pa. St. 119; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Taylor v. Taylor*, 12 Lea (Tenn.) 714; *Outhwaite v. Luntley*, 4 Campb. 179; *Bathe v. Taylor*, 15 East 412. See notes in 17 Am. R. 101,

in the body of the instrument or signature will also constitute a material alteration.<sup>17</sup> So changing the nature of a note by making it negotiable instead of non-negotiable or the like is material.<sup>18</sup> Inserting new stipulations or changing description of property as to include or describe other property will also constitute a material alteration.<sup>19</sup> Many other illustrative cases are cited in the note.<sup>20</sup>

**§ 1495. Immaterial alterations.**—It is said that an immaterial alteration is one which does not change or affect the rights, interests, duties or obligations of either of the parties in any way.<sup>21</sup> It is now

10 Am. Dec. 268, 71 Am. Dec. 724. But compare *Dukes v. Franz*, 7 Bush (Ky.) 273; *McRaven v. Crisler*, 53 Miss. 542; *Hervey v. Harvey*, 15 Me. 357; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413.

<sup>17</sup> *M'Ara v. Watson*, 2 Shaw & D. 360; *Home v. Purves*, 14 Shaw & D. 898; *Hollis v. Harris*, 96 Ala. 288, 11 So. 377; *Broughton v. Fuller*, 9 Vt. 373; *Hamilton v. Hooper*, 46 Iowa, 515, 26 Am. R. 161; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. R. 229; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. R. 48; *Lunt v. Silver*, 5 Mo. App. 186; *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. R. 74; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 82; *Smith v. United States*, 2 Wall. (U. S.) 219; *Mason v. Bradley*, 11 M. & W. 590. See, also, *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470; *Simpkins v. Windsor*, 21 Ore. 382, 28 Pac. 72.

<sup>18</sup> *Perring v. Hone*, 4 Bing. N. Cas. 28, 12 Moore, 135, 2 Car. & P. 401; *Heath v. Blake*, 28 S. Car. 406, 5 S. E. 842; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27; *Eckert v. Louis*, 84 Ind. 99; *Croswell v. Labree*, 81 Me. 44, 10 Am. St. 238; *Johnson v. Bank of U. S. 2 B. Mon. (Ky.)* 310; *Pepoon v. Staggs*, 1 Nott & McC. (S. Car.) 102; *Brown*

*v. Straw*, 6 Neb. 536, 29 Am. R. 369; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. R. 68; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. 129; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883.

<sup>19</sup> *American Pub. Co. v. Fisher*, 10 Utah, 147, 37 Pac. 259; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. 739; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113; *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365; *Sherwood v. Merritt*, 83 Wis. 233, 53 N. W. 512; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 45 N. W. 561; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235; *Montag v. Linn*, 23 Ill. 503, 551; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270.

<sup>20</sup> *Green v. Sneed*, 101 Ala. 205, 46 Am. St. 119, 13 So. 277; *Jordan v. Long*, 109 Ala. 414, 19 So. 843; *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. 246; *State v. Polke*, 7 Blackf. (Ind.) 27; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984; *Kingan v. Silvers*, 13 Ind. App. 80, 37 N. E. 413; *Davis v. Eppler*, 38 Kans. 629, 16 Pac. 793; *Andrews v. Sims*, 33 Ark. 771; *Johnson v. Heagan*, 23 Me. 329.

<sup>21</sup> See *Smith v. Crooker*, 5 Mass. 538; *Arnold v. Jones*, 2 R. I. 345; *Winter v. Pool*, 100 Ala. 503, 14 So. 411.

settled in nearly every state in this country, in accordance with the better view, that an immaterial alteration does not vitiate the instrument even though made by a party.<sup>22</sup> There are, however, a few jurisdictions in which this doctrine is denied, at least where the alteration was made with the fraudulent intent of gaining some undue advantage. Missouri<sup>23</sup> and New Jersey<sup>24</sup> are the principal, if not the only, states in which the doctrine seems to be still clearly adhered to that an alteration will avoid the instrument when the alteration is immaterial as well as when it is material. Some countenance is also given to this doctrine, perhaps, by a statement made in a number of opinions to the effect that an immaterial alteration will not vitiate the instrument unless there is a fraudulent intent.<sup>25</sup> But it is evident that in most of these cases the court did not decide the question, nor even attempt to express an opinion upon it, but merely used the expression referred to for the purpose of confining the decision to the exact question before the court, and in several of the same jurisdictions it has been expressly decided that an immaterial alteration will not vitiate.

§ 1496. **Immaterial alterations—Illustrative cases.**—An alteration which merely supplies what the law would imply in its absence

<sup>22</sup> *Tranter v. Hibbard* (Ky.), 56 S. W. 169; *Moye v. Herndon*, 30 Miss. 120; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. R. 600; *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Dec. 459; *Commonwealth v. Emigrant, &c. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Vose v. Dolan*, 108 Mass. 155, 11 Am. R. 331; *Robinson v. Phoenix Ins. Co.* 25 Iowa, 430. See, also, *Casto v. Evinger*, 17 Ind.-App. 298, 46 N. E. 648; *Warder, &c. Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053; *Prudden v. Nester*, 103 Mich. 540, 61 N. W. 777; *Cheek v. Wall*, 112 N. Car. 370, 17 S. E. 80; *Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488; *McClure v. Little*, 15 Utah, 379, 49 Pac. 298, 62

Am. St. 938; article by Judge Daniel in 2 So. L. Rev. 643; note in 41 Am. St. 84, 85, 114.

<sup>23</sup> *Haskell v. Champion*, 30 Mo. 136; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300.

<sup>24</sup> *Den v. Wright*, 2 Halst. (N. J. L.) 175, 11 Am. Dec. 546; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. R. 232. See, also, *Jones v. Crawley*, 57 N. J. L. 222, 30 Atl. 871; *York v. Janes*, 43 N. J. L. 332.

<sup>25</sup> See *Turner v. Billagram*, 2 Cal. 520, 523; *Oakland, &c. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Ford v. Ford*, 17 Pick. (Mass.) 418; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342; *Blair v. Bank*, 11 Humph. (Tenn.) 83; *Dunn v. Clements*, 7 Jones L. (N. Car.) 58; *Crawford v. Dexter*, 5 Sawy. (U. S.) 201.

is generally, if not always, immaterial.<sup>26</sup> So where an addition to the writing is a mere nullity, or in no way changes its effect, it is generally immaterial.<sup>27</sup> So merely adding to the description of property which is already sufficient and without in any way changing or affecting its identity has been held immaterial.<sup>28</sup> Changing serial numbers of bonds or notes has also been held immaterial.<sup>29</sup> So, tearing off or erasing written memoranda or marginal figures which are immaterial and no part of the written instrument has likewise been held immaterial.<sup>30</sup>

It has been held that altering the words "we hereby guarantee" to "I hereby guarantee" in an instrument signed only by one party is

<sup>26</sup> *Anderson v. Bellenger*, 87 Ala. 334, 6 So. 82; *Kelly v. Trumble*, 74 Ill. 428; *Harris v. State*, 54 Ind. 2; *James v. Dalbey*, 107 Iowa. 463, 78 N. W. 51; *James v. Tilton*, 183 Mass. 275, 67 N. E. 326; *Hunt v. Adams*, 6 Mass. 519; *Bridges v. Winters*, 42 Miss. 135; *Western B. & L. Asso. v. Fitzmaurice*, 7 Mo. App. 283; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Cole v. Hills*, 44 N. H. 227; *Kinney v. Schmitt*, 12 Hun (N. Y.) 521; *Houston v. Potts*, 64 N. Car. 33; *Blair v. Bank*, 11 Humph. (Tenn.) 83; *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733; *Waugh v. Bussell*, 5 Taunt. 707, 1 E. C. L. 362.

<sup>27</sup> *Cole v. Pennington*, 33 Md. 476; *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239; *Yeager v. Musgrave*, 28 W. Va. 90.

<sup>28</sup> *Chicago Sanitary Dist. v. Allen*, 178 Ill. 330, 53 N. E. 109; *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. 353; *Shelton v. Deering*, 10 B. Mon. (Ky.) 405; *Barrabine v. Bradshers*, 5 Mart. (La.) 190; *Brown v. Pinkham*, 18 Pick. (Mass.) 172; *Gordon v. Sizer*, 39 Miss. 805; *Chicago Title, &c. Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809; *Domestic Sew. Mach. Co. v. Barry*, 2 Misc. (N. Y.) 264, 21 N. Y. Supp. 970, 51 N. Y.

St. 219; *Gunter v. Addy*, 58 S. Car. 178; *Churchill v. Bielstein*, 9 Tex. Civ. App. 445, 29 S. W. 392.

<sup>29</sup> *State v. Cobb*, 64 Ala. 127; *Commonwealth v. Emigrant, &c. Bank*, 98 Mass. 12; *City of Elizabeth v. Force*, 29 N. J. Eq. 587; *Birdsall v. Russell*, 29 N. Y. 220 (dictum); *Tennessee, &c. Holders v. Funding Board*, 16 Lea (Tenn.) 46; *Wylie v. Missouri Pac. R. Co.* 41 Fed. 623; *Suffell v. Bank*, 51 L. J. Q. B. 401, 9 Q. B. D. 555.

<sup>30</sup> *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Palmer v. Largent*, 5 Neb. 223; *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652; *Mater v. American Nat. Bank*, 8 Colo. App. 325, 46 Pac. 221; *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Bachelor v. Priest*, 12 Pick. (Mass.) 399; *White v. Johns*, 24 Minn. 387; *Oliver v. Hawley*, 5 Neb. 439, 443; *Morrill v. Otis*, 12 N. H. 466; *Chase v. Washington Mut. Ins. Co.* 12 Barb. (N. Y.) 595; *Hubbard v. Williamson*, 27 N. Car. 397; *Kinard v. Glenn*, 29 S. Car. 590, 8 S. E. 203; *Yost v. Watertown, &c. Co. (Tex. Civ. App.)*, 24 S. W. 657; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77; *Huff v. Cole*, 45 Ind. 300; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684.

immaterial.<sup>31</sup> Retracing a faded name with ink or tracing with ink a word written in pencil has been held immaterial.<sup>32</sup> It has also been held that erasing a scroll, which took the place of a seal, from a written instrument, and substituting another in juxtaposition with the name of the signer, was not a material alteration;<sup>33</sup> and the same has been held as to inserting the name of one who has signed the instrument in the body thereof, or correcting the initials or Christian name where the identity is not thereby changed.<sup>34</sup> So, affixing an internal revenue stamp was held immaterial in a state in which it was held that the act of Congress of June 13, 1898, did not apply in the state courts as to the question of the admissibility in evidence of an unstamped instrument.<sup>35</sup>

§ 1497. **Filling blanks.**—An alteration before an instrument is signed, or, in most instances, even before it is delivered, will not vitiate it, and this is also true where the parties all consent to the alteration.<sup>36</sup> Signing and delivering an instrument with blanks left in it may give the holder implied authority to fill such blanks in conformity with the general character of the instrument;<sup>37</sup> and a maker who leaves

<sup>31</sup> *Kline v. Raymond*, 70 Ind. 271.

<sup>32</sup> *Dunn v. Clements*, 7 Jones L. (N. Car.) 58; *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127.

<sup>33</sup> *Keen v. Monroe*, 75 Va. 424.

<sup>34</sup> *Reed v. Kemp*, 16 Ill. 445; *State v. Pepper*, 31 Ind. 76; *Bird v. Bird*, 40 Me. 398; *Oakland &c. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147; *In re Howgate & Osborn's Contract*, 71 L. J. Ch. 279, [1902] 1 Ch. Div. 451. See, also, *Casto v. Evinger*, 17 Ind. App. 298, 46 N. E. 648; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. R. 226; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *State v. Dean*, 40 Mo. 464; *Outfoun v. Dublin*, 72 Md. 536, 20 Atl. 134; *Blair v. Bank*, 11 Humph. (Tenn.) 83; *Birmingham Trust, &c. Co. v. Whitney*, 88 N. Y. S. 578. So as to writing memoranda as to interest on the note. *Boutelle v. Carpen-*

*ter*, 182 Mass. 417, 65 N. E. 799. See, also, *Carr v. Welch*, 46 Ill. 88; *Reed v. Culp*, 63 Kans. 595, 66 Pac. 616.

<sup>35</sup> *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636.

<sup>36</sup> *Ravisies v. Alston*, 5 Ala. 297; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Janney v. Goehring*, 52 Minn. 428, 544 N. W. 481; *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *City of Boston v. Benson*, 12 Cush. (Mass.) 61.

<sup>37</sup> *Spiliter v. James*, 32 Ind. 202, 2 Am. R. 334; *Edwards v. Scull*, 11 Ark. 325; *Angle v. Northwestern, &c. Ins. Co.* 92 U. S. 330; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. R. 573; *Commercial Bank, &c. v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Eagleton v. Gutteridge*, 11 M. & W. 465; *West v. Steward*, 14 M. & W. 47; and many other authorities cited in notes in 10 Am. Dec. 271, 13 Am. Dec. 669, 17 Am. R. 97.

such blanks to be filled, where they are afterwards filled in such a manner as to excite no suspicion, may be held liable to a bona fide holder.<sup>38</sup> But such authority will not always be implied,<sup>39</sup> especially in the case of deeds, and there is no implied authority to make a new instrument by erasure of material parts nor by filling in blanks with matter that is plainly repugnant to the terms and meaning of the instrument as expressed therein.<sup>40</sup>

**§ 1498. Accidental changes.**—Where a party who intends to sign in one place accidentally signs in another, or accidentally attests more than one signature when he intended to attest only one, the writing of the name in the wrong place is not an alteration that will vitiate the instrument.<sup>41</sup> So there are other instances in which a change, even though made by a party or person interested, will not vitiate the instrument when it is the result of mistake of fact or inadvertence, without any purpose of altering the instrument.<sup>42</sup> And it has been

<sup>38</sup> *Montgomery v. Crosssthaite*, 90 Ala. 553, 8 So. 498, 24 Am. St. 832; *Angle v. Northwestern, &c. Ins. Co.* 92 U. S. 330; *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 96; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. R. 318; *Light v. Kellinger*, 16 Ind. App. 102, 44 N. E. 760; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. R. 382; *Canon v. Grigsby*, 116 Ill. 151, 56 Am. R. 769; *Abbott v. Rose*, 62 Me. 194, 16 Am. R. 427; *Garrard v. Hadden*, 67 Pa. St. 82, 5 Am. R. 412. But see *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. R. 67; *Holmes v. Trumper*, 22 Mich. 427; *Knoxville, &c. Bank v. Clark*, 51 Iowa, 264, 1 N. W. 491; *Hooper v. Collingwood*, 10 Colo. 107, 13 Pac. 909, 3 Am. St. 565; *Goodman v. Eastman*, 4 N. H. 455. See, generally, notes in 4 Am. St. 25, 10 Am. Dec. 267.

<sup>39</sup> *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Schintz v. McManamy*, 33 Wis. 299. But see *Cronkhite v.*

*Nebeker*, 81 Ind. 319, 42 Am. R. 127.

<sup>40</sup> *McCoy v. Lockwood*, 71 Ind. 319; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Angle v. Northwestern, &c. Ins. Co.* 92 U. S. 330; *Mohaine Bank v. Douglass*, 31 Conn. 170; *Clawson v. Gustin*, 5 N. J. L. 821; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 14 Am. St. 371.

<sup>41</sup> *Fisher v. King*, 153 Pa. St. 3, 25 Atl. 1029; *Marshall v. Gougler*, 10 S. & R. (Pa.) 164; *Hilton v. Houghton*, 35 Me. 143; *Brett v. Marston*, 45 Me. 401; *Cason v. Wallace*, 67 Ky. 388; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 Sup. Ct. 657. But see *Girdner v. Gibbons*, 91 Mo. App. 412.

<sup>42</sup> *Russell v. Longmore*, 29 Neb. 209, 45 N. W. 624; *Milbery v. Storer*, 75 Me. 69, 46 Am. R. 361; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43; *Garner v. Peychaud*, 9 La. (O. S.) 182; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Boulware v. Bank*, 12 Mo. 542; *Henrietta Nat. Bank v. State Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St.



laid down in general terms that "whenever it is clear that an instrument once perfect has become mutilated or defaced by accident or the effect of time, such mutilation or effacement operates nothing against its validity."<sup>43</sup>

**§ 1499. Changes to correct mistakes or to conform to intention—Restoration.**—There is sharp conflict among the authorities as to the effect of an alteration made to correct a mistake or to conform the instrument to the intention of the parties. In many cases, proceeding largely upon the ground that the holder is impliedly authorized to make the alteration, it is held that a party may correct a mistake in the instrument and so alter it as to make it truly represent the agreement or intention of the parties. This seems to be the rule in England and in Alabama, Arkansas, California, Connecticut, Georgia,

773; *Raper v. Birbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428, 10 E. C. L. 198. See, also, *Newton v. Bramlett*, 55 Ill. App. 661, 663; *Horst v. Wagner*, 43 Iowa, 373, 22 Am. R. 255.

<sup>43</sup> 2 Cyc. 146, citing *Frazer v. Boss*, 66 Ind. 1; *Cochran v. Nebeker*, 48 Ind. 459; *Murray v. Graham*, 29 Iowa, 520; *Rhoads v. Frederick*, 8 Watts (Pa.) 448; *Burton v. Pressly*, Cheves Eq. (S. Car.) 1; *Doe v. McGill*, 8 U. C. Q. B. 224. In *Russell v. Longmoor*, 29 Neb. 209, 45 N. W. 624, 625, the holder of a chattel mortgage in the form of a bill of sale with a defeasance clause, tore it into two parts, but, upon the trial, offered the two parts in evidence as an entirety, and the court held the same admissible, saying:

"It appears that Longmoor, desiring to place that part which he understood to be the bill of sale upon record, and not conceiving it expedient to record the part he considered the contract, caused the instrument to be divided and separated as it was. It is very clear that the recording of that part of the instrument so recorded was of

no effect for the purpose of giving notice; but it by no means follows that the separation of the instrument had no effect upon its legality, or of the notice which any party had of its existence as originally executed, or that it could not be restored to its original condition, and introduced in evidence between the plaintiff and parties charged with such notice. Neither is there any evidence of fraudulent intent on the part of the plaintiff or her agent in causing such separation, especially against any party to the present action. We are cited to various precedents of the fraudulent alteration of promissory notes and other written instruments, but to none which treats the question involved here; nor have I been able to find a case strictly a precedent. Doubtless, had not both parts of the instrument been before the court at the trial, neither part of it, separately, should have been permitted to go to the jury; but I know of no rule which would prevent the two parts, restored and united, or in a condition to be so, to be allowed to go to the jury as a whole instrument."

Indiana, Massachusetts, Michigan, Mississippi, New York, Utah and Wyoming.<sup>44</sup>

Other courts recognize the danger of permitting anyone to tamper with a written instrument, and deny the right of a party thereto, without the consent of the other party or parties, to alter the instrument to make it conform to what he believes to be the true intention of the parties. This seems to be the rule in Illinois, Iowa, Maine, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee and Virginia.<sup>45</sup>

It is impossible to reconcile all the decisions upon this question. The weight of authority, as shown by the cases cited, seems to be to the effect that the alteration may be made under the circumstances indicated. But it should clearly appear that the alteration or change was made to correct the instrument so as to make it conform to the real agreement and intent of the parties at the time it was executed, and not merely to what one of the parties supposed it to be, where the instrument was executed as it was intended to be executed. This distinction, if valid and well made, will aid in reconciling many of the authorities.

\* See *Tubb v. Madding*, Minor (Ala.) 129; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Sill v. Reese*, 47 Cal. 294; *Nichols v. Johnson*, 10 Conn. 192; *Hanson v. Crawley*, 41 Ga. 303; *Osborn v. Hall*, 160 Ind. 153, 66 N. E. 457 (reviewing many authorities); *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494; *Produce Exch. &c. Co. v. Breberbach*, 176 Mass. 577, 58 N. E. 162; *Ames v. Colburn*, 11 Gray (Mass.) 390, 71 Am. Dec. 723; *Lee v. Butler*, 167 Mass. 426, 57 Am. St. 466, 46 N. E. 52; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *McRaven v. Crisler*, 53 Miss. 542; *Conner v. Routh*, 7 How. (Miss.) 176, 40 Am. Dec. 59; *Foote v. Hambrick*, 70 Miss. 157; *Domestic, &c. Co. v. Barry*, 2 Misc. (N. Y.) 264, 21 N. Y. Supp. 970; *Flint v. Craig*, 59 Barb. (N. Y.) 319; *Booth v. Powers*, 56 N. Y. 22; *McClure v. Little*, 15

Utah, 379, 62 Am. St. 938, 49 Pac. 298; *McLaughlin v. Venine*, 2 Wyo. 1; *Brutt v. Picard*, Ry. & M. 37; *Kershaw v. Cox*, 3 Esp. 246.

\* *Kelly v. Trumble*, 74 Ill. 428; *Hayes v. Wagner*, 89 Ill. App. 390 (to some extent apparently contra: *Chamberlin v. White*, 79 Ill. 549; *Ryan v. First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120); *Murray v. Graham*, 29 Iowa, 520 (but see *Epperley v. Ferguson*, 118 Iowa, 47, 91 N. W. 816); *Chadwick v. Eastman*, 53 Me. 12 (contra: *Hervey v. Harvey*, 15 Me. 357); *Evans v. Foreman*, 60 Mo. 449; *First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. R. 397 (contra: *State v. Dean*, 40 Mo. 464); *Brown v. Straw*, 6 Neb. 536, 29 Am. R. 369; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. 705, 43 N. E. 683 (contra: *Jessup v. Dennonson*, 2 Disn. (Ohio) 150); *Miller v. Gilleland*, 19 Pa. St. 119; *Taylor v. Taylor*, 80 Tenn. (12 Lea) 714; *Dobyns v. Rawley*, 76 Va. 537.

It has been held that a fraudulent material alteration not only destroys the instrument itself, but also prevents an action being based on the original consideration, and that, therefore, no subsequent restoration of the instrument, without ratification, can restore its validity.<sup>46</sup> But where the alteration was made by mistake, or without fraudulent intent, it is a vexed question as to whether there can be a recovery after the instrument has been restored. The weight of authority seems to be to the effect that there can be in a proper case,<sup>47</sup> and in those jurisdictions in which it is held that an alteration may be made to correct a mistake and conform the instrument to the intention of the parties, it would seem to follow that the restoration of the instrument to its original condition in conformity with such intention would not avoid it. But in some other jurisdictions a contrary view is taken.<sup>48</sup> In one state, at least, a distinction has been drawn between cases in which the restoration is by the party who made the alteration and before the instrument has left his hands, and cases in which it is attempted after he has parted with the instrument,<sup>49</sup> but, while there is some reason for this distinction, it is not generally made.

**§ 1500. Use of altered instruments.**—It is laid down as a general proposition by Judge Taylor, that “when the instrument, on

<sup>46</sup> *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

<sup>47</sup> *Rogers v. Shaw*, 59 Cal. 260; *Hayes v. Wagner*, 89 Ill. App. 390; *Newton v. Bramlett*, 55 Ill. App. 661; *Swigart v. Weare*, 37 Ill. App. 258; *Horst v. Wagner*, 43 Iowa, 373, 22 Am. R. 753; *Nevins v. DeGrand*, 15 Mass. 436; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. R. 257; *Nickerson v. Swett*, 135 Mass. 514; *Russell v. Longmoor*, 29 Neb. 209, 45 N. W. 624; *McAlpin v. Clark*, 11 Ohio C. C. 524; *Seymour v. Mickey*, 15 Ohio St. 515; *Wallace v. Tice*, 32 Ore. 283, 51 Pac. 733; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. R. 541; *Skelton v. Tillman* (Tex.), 20 S. W. 71.

<sup>48</sup> *Cotton v. Edwards*, 2 Dana (Ky.) 106; *Warpole v. Ellison*, 4 Houst. (Del.) 322; *McDaniel v.*

*Whitsett*, 96 Tenn. 10, 33 S. W. 567; *Waterman v. Vose*, 43 Me. 504; *Martendale v. Follet*, 1 N. H. 95. See, also, *Hayes v. Wagner*, 89 Ill. App. 390; *Citizens' Nat. Bank v. Williams*, 174 Pa. St. 66, 34 Atl. 303, 35 L. R. A. 464; *Fulmer v. Seitz*, 68 Pa. St. 237, 8 Am. R. 172; *McMurtrey v. Sparks*, 71 Mo. App. 126; *Ruby v. Talbott*, 5 N. Mex. 251, 21 Pac. 72, 3 L. R. A. 724; *Robinson v. Reed*, 46 Iowa, 219; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110.

<sup>49</sup> *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753, 33 Am. R. 143. See, also, *Osborne v. Andress*, 37 Kans. 301, 15 Pac. 153; *Acme Harvester Co. v. Butterfield*, 12 S. Dak. 91, 80 N. W. 170; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. R. 541.

its production, appears to have been altered, it is a general rule that the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice; because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion. If the alteration be noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored."<sup>50</sup> "It is not, however," he says at another place, "on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is seeking to enforce it, or claiming an interest under such instrument."<sup>51</sup> Thus, it has been held in several cases that such an instrument, though not valid for the purpose of taking an interest under it, may nevertheless be admissible to prove a collateral fact.<sup>52</sup> In a recent case in Alabama it is held that a deed, in so far as it has operated as a conveyance, is not avoided by alteration, and that it remains a muniment of title, and with or without explanation is evidence of title, and may be used as such.<sup>53</sup> This has several times been held to be the law in England,<sup>54</sup> and there are decisions in other states in this country as well as Alabama that tend to support this doctrine;<sup>55</sup> but there are also authorities to the con-

<sup>50</sup> 3 Taylor Ev. (Chamberlayne's ed.) § 1819. See, also, *Ofenstein v. Bryan*, 20 D. C. App. 1; *Wheadon v. Turregano* (La.), 36 So. 808. As to the last proposition, see, also, *Howell v. Hanrick*, 88 Tex. 383, 29 S. W. 762; *Smith v. United States*, 2 Wall. (U. S.) 219, 232.

<sup>51</sup> 3 Taylor Ev. § 1824, citing *Earl of Falmouth v. Roberts*, 9 M. & W. 469; *Pattinson v. Luckley*, L. R. 10 Ex. 330.

<sup>52</sup> *Hutchins v. Scott*, 2 M. & W. 808, 815-817; *Agriculturist, &c. Ins. Co. v. Fitzgerald*, 20 L. J. Q. B. 244, 4 Eng. L. & Eq. 211. See, also, *Gould v. Coombs*, 1 C. B. 543, 50 E. C. L. 543; *Parker v. Moore*, 29 Mo. 218. But compare *Low v. Merrill*, 1 Pin. (Wis.) 340, and see

*Smith v. Frye*, 14 Me. 457; *Courcamp v. Weber*, 39 Neb. 538; *Babb v. Clemenson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684; *Elgin v. Hall*, 82 Va. 680; *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

<sup>53</sup> *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. 78.

<sup>54</sup> *Doe v. Hirst*, 3 Stark. 60, 3 E. C. L. 594, and authorities cited in third note to this section. See, also, *Ward v. Lumley*, 5 Hurl. & N. 87; *Elphinstone Interp. Deeds*, 19.

<sup>55</sup> See *Jackson v. Gould*, 7 Wend. (N. Y.) 364; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Burnett v. McCluey*, 78 Mo. 676; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Alabama, &c. Co. v. Thomp-*

trary.<sup>56</sup> The reasons for the former view are well stated, and most of the authorities are reviewed, in a case from which we quote in the note below.<sup>57</sup>

**§ 1501. Altered instrument admitted with explanation.—For-**

son, 104 Ala. 570, 16 So. 440, 53 Am. St. 80. See, also, *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843; *Slattery v. Slattery*, 120 Iowa, 717, 95 N. W. 201.

<sup>56</sup> *Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684; *Withers v. Atkinson*, 1 Watts (Pa.) 236; 236; *Chesley v. Frost*, 1 N. H. 145; *Batchelder v. White*, 80 Va. 103; *Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165.

<sup>57</sup> "The contrary doctrine is based on the idea that a deed so altered is void ab initio and for all purposes. This cannot be true, for such deed is confessedly valid when executed, else title could not have passed by it. And all authorities agree that title could not and is not divested by the subsequent alteration. All authorities agree, also, that, notwithstanding the unauthorized erasures or interlineation, it is open to the grantee named in the paper to show, by any competent evidence, the fact of the passing of title into him. In other words, he may and must show that a deed conveying the land to him was executed by the grantor named in the altered paper; he must prove the execution and contents of a deed, and this, of course, by the best evidence the case admits. He cannot resort to parol evidence of the contents of a paper which has not been lost or physically destroyed, but, on the contrary, if then in his possession and in court, the paper itself, re-

gardless of a signature to it, would be the best evidence of its own contents. Nor can he resort to parol evidence to show execution of a paper which is in court purporting to be signed by the grantor, and bearing the solemn official certification required by the statutes, that the person whose name appears to be signed to it admitted and acknowledged that he executed the instrument; the certificate of acknowledgment would itself be the very best and only competent evidence of the fact of the execution. It is upon him to prove a deed as that deed existed the moment after its execution was completed by delivery to him. He has that deed as it then existed, duly acknowledged, in his possession. Nobody questions it. All that is shown is, that certain words which were in the deed at that time have been marked across without authority. The words themselves are still visible and legible in the paper. His adversary says to him, 'The paper you have and offer, including the words you have attempted to erase, is my deed.' He offers this paper, including those words. Could there possibly be any better, or indeed any other competent evidence of the contents of such a deed than the deed itself, or of its execution, than the statutory acknowledgment appended to it? We think not." *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 16 So. 440, 53 Am. St. 80.

merly it seems to have been the rule that if an instrument was altered in a material part, the court declared it to be void, and refused to receive it in evidence for any purpose, even though the alteration was capable of explanation.<sup>58</sup> But under the present practice the fact of such an alteration does not necessarily require the court to exclude the instrument when offered in evidence,<sup>59</sup> as the question of the alteration and the time when it was made is ultimately for the jury to determine from the instrument in connection with the explanatory evidence adduced by the parties.

It is also said to be a general rule that immaterial alterations in a paper offered in evidence, although apparent on its face, need not be explained before receiving the paper in evidence.<sup>60</sup> The question of materiality is for the court, and it has been said that it is for the court to determine, in the first instance, whether the alteration, when material, is so far accounted for as to permit the instrument to be read in evidence to the jury.<sup>61</sup> But the rule now seems to be in nearly all jurisdictions that if there is any evidence tending to sufficiently account for the alteration the instrument should be admitted and left to the jury with the explanation, and in jurisdictions in which there is no presumption, or where there is no presumption against the instrument, it would seem that the instrument should be admitted, in the first instance, in a proper case, even though no explanation is offered at the time.

**§ 1502. Instrument fair on its face—Burden of proof.**—The authorities are practically harmonious to the effect that where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the

<sup>58</sup> See *Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684; *Soaps v. Eichberg*, 42 Ill. App. 375, as to former rule.

<sup>59</sup> *Comstock v. Smith*, 26 Mich. 306; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. R. 232; *Pringle v. Chambers*, 1 Abb. Pr. (N. Y.) 58; *Ravies v. Alston*, 5 Ala. 297; *Mitchell v. Woodward*, 2 Marv. (Del.) 311.

<sup>60</sup> *Lee v. Newland*, 164 Pa. St. 360, 30 Atl. 258; *Zimmerman v. Camp*, 155 Pa. St. 152, 25 Atl. 1086; *Virginia, &c. Co. v. Fields*, 94 Va. 102,

26 S. E. 426; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163.

<sup>61</sup> 1 *Greenleaf Ev.* § 564, citing *Tillou v. Clinton, &c. Ins. Co.* 7 Barb. (N. Y.) 564; *Ross v. Gould*, 5 Greenl. (Me.) 204. See, also, *Ofenstein v. Bryan*, 20 D. C. App. 1; *Ward v. Cheney*, 117 Ala. 238, 22 So. 996; *Austin v. Austin*, 45 Wis. 523. Testimony that interlineations were made before the contract was signed and delivered is held sufficient foundation for its introduction in evidence. *Consumers' Ice Co. v. Jennings* (Va.), 42 S. E. 879.

burden of showing that it has been altered is upon the party who alleges it.<sup>62</sup> That is to say, he must produce evidence to meet the *prima facie* case, although the burden of proof in the sense of ultimately establishing his case may be and remain upon the other party.<sup>63</sup>

**§ 1503. Burden of proof and presumptions where alteration is apparent—English rule.**—Mr. Stephen thus states the rule as he understands it to be established in England: "Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed. Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will. There is no presumption as to the time when alterations and interlineations appearing on the face of writings, not under seal, were made, except that it is presumed that they were so made that the making would not constitute an offense."<sup>64</sup>

Judge Taylor states it as follows: "It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument; and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof. Indeed, it may be laid down as a general rule, that wherever it is an offense to alter a document after it has been completed, the law presumes, *prima facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offense. With respect, however, to a bill of exchange, or a promis-

<sup>62</sup> *Glover v. Gentry*, 104 Ill. 222, 16 N. E. 38; *Montgomery v. Cross-thwait*, 90 Ala. 553, 24 Am. St. 832, 8 So. 498; *Chism v. Toomer*, 27 Ark. 108; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 So. 140, 1 Am. St. 201; *McClintock v. State Bank*, 52 Neb. 130, 71 N. W. 987; *Riley v. Riley*, 9 N. Dak. 580, 84 N. W. 347; *Gettysburg Nat. Bank v. Gage*, 4 Pa. Super. Ct. 505; *Cosgrove v. Fanebust*, 10 S. Dak. 213, 72 N. W. 469; *Smith v. Parker* (Tenn.), 49 S. W. 285; *Kansas, &c. Ins. Co. v. Coalson*, 22 Tex. Civ.

App. 64, 54 S. W. 388; *First Nat. Bank v. Pritchard*, 2 Willson (Tex. App. Civ. Cas.) 130; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99.

<sup>63</sup> See *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 353, 39 N. E. 358. The admission or proof of the signature generally makes a *prima facie* case. See *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99.

<sup>64</sup> Stephen Dig. Ev. art. 89.

sory note, the law presumes nothing, but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made. These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof."<sup>65</sup>

**§ 1504. Burden of proof and presumptions where alteration is apparent—Conflicting views.**—There is almost hopeless conflict among the decisions in this country as to the burden of proof and presumption, if any, where the alteration is apparent upon the face of the instrument.<sup>66</sup> Four more or less different and distinct views are taken: (1) it is held in one line of cases that no presumption arises from an alteration apparent on the face of the instrument, and that

<sup>65</sup> 3 Taylor Ev. § 1819. It is said, in some of the cases, that the early decisions making a distinction in favor of deeds and against negotiable instruments were based on the stamp act.

<sup>66</sup> Attention is called to the irreconcilable conflict among the authorities and the different lines of decision are stated substantially as above in the note in 86 Am. St. 129; also, in *Neil v. Case*, 25 Kans. 355; *Wilson v. Hayes*, 40 Minn. 351, 42 N. W. 467, 4 L. R. A. 196; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; and *Cass County v. American, &c. Bank*, 9 N. Dak. 263, 83 N. W. 12.

In *Cox v. Palmer*, 3 Fed. 16, 18, it is said that the conflict is largely apparent rather than real, and the following is suggested as the true rule, which will reconcile most of the decisions:

"If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in handwrit-

ing different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before the execution. *Stoner v. Ellis*, 6 Ind. 152; *Huntington v. Finch & Co.* 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Burnham v. Ayer*, 35 N. H. 351; *Beaman v. Russell*, 20 Vt. 205."

But, while this is a step in the right direction, it does not reconcile all the authorities, and, indeed, it seems, according to the better view, to go too far in saying that there is any true presumption.



the question as to the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic; (2) another line of cases holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery; (3) a third line holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious; (4) a fourth line of cases holds that an alteration, apparent on the face of the paper, is, without explanation, presumed to have been made before delivery. This classification of the authorities is, however, approximate only, and not absolutely definite and exact, as many of the courts have taken compromise positions, holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the character of the instrument, and the like.

**§ 1505. View that alteration raises no presumption.**—The better view seems to be that an apparent alteration ordinarily raises no true presumption as to the time of the alteration or the validity or invalidity of the instrument, and there are many authorities supporting this doctrine, although in most of them it is said that a suspicious alteration requires explanation, and that the burden is upon the party who claims under the instrument to explain the alteration or otherwise establish its genuineness, but the entire matter is left to the jury without any presumption as to when the alteration was made.<sup>67</sup> In one of the cases the court held that there was no presumption against negotiable instruments any more than against deeds, and the contention that a presumption was raised against the instrument when the alteration was suspicious was answered as follows: "But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And if held suspicious when must it be explained—before or after

<sup>67</sup> *Gist v. Gans*, 30 Ark. 285; *Klein v. German Nat. Bank*, 69 Ark. 140, 61 S. W. 572, 86 Am. St. 183; *Ward v. Cheney*, 117 Ala. 238, 22 So. 996; *Robinson v. State*, 60 Ind. 26; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Ely v. Ely*, 6 Gray (Mass.) 439; *Simpson v. Davis*, 119 Mass. 269, 20 Am. R. 324; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A.

196, 12 Am. St. 754; *Hagan v. Merchants, &c. Ins. Co.* 81 Iowa, 321, 46 N. W. 1114; *Wolferman v. Bell*, 6 Wash. 348, 33 Pac. 834; *Reed v. Kemp*, 16 Ill. 445; *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907; *Neil v. Case*, 25 Kans. 510, 37 Am. R. 259; *Hayden v. Goodnow*, 39 Conn. 164; *Martin v. Tuttle*, 80 Me. 310, 14 Atl. 207.

it is admitted in evidence? Evidence as to when, by whom, and with what intent an alteration was made may be one or both of two kinds, extrinsic or intrinsic, the latter being that furnished by the inspection of the instrument itself—such as its appearance, the nature of the alteration, etc. These things, considered in connection with the relation of the parties to the instrument, may often constitute important evidence. And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case.”<sup>68</sup> The doctrine of this section is well stated in an opinion of the Supreme Court of New Hampshire, and we quote from it as follows: “It seems to us that the proper rule is that the instrument, with all the circumstances of its nature, its history, the appearance of the alteration, the possible or probable motives to the alteration, or against it, on the part of all the persons connected with it, or in whose possession it may have been, and the effect of the alteration upon the rights and obligations of the parties, respectively, ought to be submitted to the jury, who should find from all these whether the alteration was made before or after execution, and if after, whether it was with the assent of the adverse party, and consequently, whether it rendered the instrument invalid or not. Whether the handwriting of the alteration is the same with the body of the instrument, whether it is the same with that of the signature, whether the ink is the same or different, whether, from the appearance, the

<sup>68</sup> *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. 754. The court held that the burden was upon the party who claimed that the alteration was made after delivery to show it, saying:

“We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery, or, perhaps, to state the proposition with more precision, the proof or admission of a signa-

ture of a party to an instrument is *prima facie* evidence that the instrument written over it is his act, and this *prima facie* evidence will stand as binding proof unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom, and with what intent the alteration was made, is one of fact to be submitted to the jury upon the whole evidence, intrinsic and extrinsic.”

body of the instrument and the alteration were written at the same time or at different times, whether the party claiming or the party sought to be charged is to be benefited by it, whether the alteration was made before or after execution, and if after, by whom, and for what purpose, are all questions of fact for the consideration of the jury. It could serve no good practical purpose for the court to go into these inquiries first, to determine whether a party has made a *prima facie* case. Upon the usual proof of the execution of the instrument, it should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be given to the jury, with proper instructions upon the facts in each case."<sup>69</sup>

**§ 1506. Presumption that alteration was after delivery.**—In a few cases it has been said that an unexplained alteration upon the face of an instrument should be presumed to have been made after the execution and delivery of the instrument. The cases supporting this doctrine, however, are comparatively few. They are confined in the main to cases of negotiable instruments, or at least to other instruments than deeds. It has been said that they are based upon a misconception of early English cases which really depended upon the stamp acts that were applicable only to negotiable instruments.<sup>70</sup> This, however, has been denied.<sup>71</sup> And there are several jurisdictions in which his doctrine seems to obtain.<sup>72</sup> But it is severely criticised in a recent case.<sup>73</sup>

**§ 1507. Presumption that alteration was after delivery—Where suspicious.**—A third view, more often taken, is that which presumes

<sup>69</sup> *Cole v. Hills*, 44 N. H. 227; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321.

<sup>70</sup> *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

<sup>71</sup> *Simpson v. Stackhouse*, 9 Pa. St. 189, 49 Am. Dec. 554.

<sup>72</sup> *Hill v. Barnes*, 11 N. H. 397; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Dow v. Jewell*, 18 N. H. 430, 45 Am. Dec. 371; *Jackson v. Obsorn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Wilson v. Henderson*, 17 Miss. 375, 48 Am.

Dec. 716; *Bank v. Lum*, 7 How. (Miss.) 414; *Heffelfinger v. Schultz*, 6 S. & R. (Pa.) 44; *Henman v. Dickinson*, 5 Bing. N. Cas. 183, 15 E. C. L. 409. See, also, *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 565, 32 Atl. 730.

<sup>73</sup> *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 12 Am. St. 754. See, also, *Franklin v. Baker*, 48 Ohio St. 296; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Gooch v. Bryant*, 13 Me. 386; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075.

that the alteration was made after execution where it or the circumstances surrounding it are suspicious, but not otherwise.<sup>74</sup> Many of the authorities supporting this view also take the view that if the circumstances are not suspicious the presumption should be that the alteration was made at the time of or before the execution of the instrument, while some of them indicate that in such a case there is no presumption at all. In a few cases it is held that the fact that no explanation is offered may be considered by the jury as evidence, or in the nature of evidence, in connection with the suspicious alteration.<sup>75</sup>

**§ 1508. Presumption that alteration was before delivery.**—The fourth view or doctrine is that even in the absence of any explanation an alteration apparent upon the face of the instrument, whether suspicious in itself or not, should be presumed to have been made before or at the time of the execution of the instrument.<sup>76</sup> This doctrine is based largely upon the presumption of innocence or right doing

<sup>74</sup> See *Alabama, &c. Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. 80, 16 So. 440; *Fontaine v. Gunter*, 31 Ala. 264; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202; *Kelley v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Stilwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Tillon v. Clinton, &c. Ins. Co.* 7 Barb. (N. Y.) 564; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. 877, 17 S. W. 614; *Park v. Glover*, 23 Tex. 470; *Deweese v. Bluntzer*, 70 Tex. 406, 7 S. W. 820; *Harper v. Stroud*, 41 Tex. 372; *Bradley v. Dells Lumber Co.* 105 Wis. 245, 81 N. W. 394; *Smith v. United States*, 69 U. S. 219; *Cox v. Palmer*, 1 McCrary (U. S.) 431, 3 Fed. 16.

<sup>75</sup> *Davis v. Carlisle*, 6 Ala. 707; *Crabtree v. Clark*, 20 Me. 337; *Herrick v. Malin*, 22 Wend. (N. Y.) 389. So held, on the other hand, as to alterations against interest. *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Den v. Farlee*, 21 N. J. L. 279; *Wilson v. Henderson*, 9

*Smed. & M. (Miss.)* 379, 48 Am. Dec. 716.

<sup>76</sup> *Sharpe v. Orme*, 61 Ala. 263; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. 82, 13 So. 570; *Portsmouth Sav. Bank v. Wilson*, 5 D. C. App. 8; *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *Hagan v. Merchants' Ins. Co.* 81 Iowa, 321, 25 Am. St. 493, 46 N. W. 1114; *First Nat. Bank v. Franklin*, 20 Kans. 264; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Brand v. Johnrowe*, 60 Mich. 210, 26 N. W. 883; *Sirine v. Briggs*, 31 Mich. 443; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. 754, 42 N. W. 467; *Paul v. Leefer*, 98 Mo. App. 515, 72 S. W. 715; *Holladay-Klotz Land, &c. Co. v. T. J. Moss Tie Co.* 87 Mo. App. 167; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. St. 232; *North River, &c. Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258; *Newman*

and upon the idea that it should not be assumed that a wrong or especially an offense has been committed. But in several of the decisions cited in its support, as well as in some of those cited in support of other doctrines, there are expressions that leave it somewhat uncertain as to just what view the court meant to take, and the ground upon which many of them are based might be admitted to be substantial without necessarily admitting the conclusion. The rule or doctrine that there is no true presumption one way or the other does not assume that one has been guilty of wrong nor deny the existence or effect of the presumption of innocence, good faith or right doing in a proper case, and it seems to be the doctrine best supported by reason if not by authority.

**§ 1509. Presumption where alteration is shown after execution.**

It is the generally accepted rule that when an alteration subsequent to execution is once shown to have been made, especially where the instrument has been in the custody of the holder since execution, it will be presumed, or at least may be inferred, to have been made by him or by one under whom he claims, and not by a stranger to the instrument.<sup>77</sup> But where it has not been in the custody of the claimant or anyone interested on his side, and, especially, if the alteration is against his interest, there would seem to be no room for such a presumption; and in such a case it has even been said that it is fair to presume

v. King, 54 Ohio St. 273, 56 Am. St. 705, 43 N. E. 683; Franklin v. Baker, 48 Ohio St. 296, 29 Am. St. 547, 27 N. E. 550; Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597; Foley-Wadsworth, &c. Co. v. Solomon, 9 S. Dak. 511, 70 N. W. 639; Kleeb v. Barb, 12 Wash. 140, 40 Pac. 733; Maldaner v. Smith, 102 Wis. 30, 78 N. W. 140; Cox v. Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

<sup>77</sup> White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Winter v. Pool, 100 Ala. 503, 14 So. 411; Lamar v. Brown, 56 Ala. 157; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Lewis v. Shepherd, 1 Mackey (D. C.) 46; Daniel v. Daniel, Dud. (Ga.) 239; Scott v. Walker, Dud.

(Ga.) 243; Casto v. Evinger, 17 Ind. App. 298, 300, 46 N. E. 648; Green v. Beckner, 3 Ind. App. 39, 29 N. E. 172; Bowman v. Mitchell, 79 Ind. 84; Cochran v. Nebecker, 48 Ind. 460; Maguire v. Eichmeier, 109 Iowa, 301, 80 N. W. 395; Croft v. White, 36 Miss. 455; Bowlers v. Jewell, 2 N. H. 543; Chesley v. Frost, 1 N. H. 145; Trow v. Glen Cove Starch Co. 1 Daly (N. Y.) 280; National Ulster Bank v. Madden, 114 N. Y. 280; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Hubbard v. Williamson, 25 N. Car. 397; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1131; Davis v. Crawford (Tex.), 53 S. W. 384. Contra: Willard v. Ostrander, 51 Kans. 481, 37 Am. St. 294, 32 Pac. 1092; Phillips v. Breck, 79 Ky. 465.

(or infer) that if the alterations were made by anyone, they were not made by those claiming under the instrument.<sup>78</sup>

**§ 1510. Issue of alteration—Scope of evidence.**—On an issue as to whether an instrument has been altered, especially where there is an issue of fraud, considerable latitude is allowed in the scope of the evidence. It is impossible to define the extent or limits in exact terms, but it may be said that, generally speaking, it is competent to put in evidence all the material and relevant circumstances attending the execution of the writing or bearing in any way upon the transaction or otherwise properly tending to show whether there has been a material alteration, and, if so, when, how, and by whom it was made.<sup>79</sup> But it has been held that the rule permitting evidence of surrounding circumstances does not authorize the admission of evidence to the effect that one maker of a note was in embarrassed circumstances when it was executed, in an action against the other makers, for the purpose of showing that it was altered by him so as to increase its amount before negotiating it.<sup>80</sup>

Testimony by a plaintiff, however, to show that it was his custom to write mortgages for customers, leaving the date blank, and afterward to fill the blanks when the intended mortgagor came in to execute the mortgage, has been held to be admissible.<sup>81</sup> It has also been held that on an issue as to whether a chattel mortgage was executed in blank, to be filled by the mortgagee, and whether he exceeded his authority thus impliedly given, the situation of the parties and all that was said when the authority was given would be competent evidence, and that although the mortgagor could not testify to his "expectation" so as to affect the construction of the language of the mortgage, such evidence is material upon the question as to whether

<sup>78</sup> *Coulson v. Walton*, 9 Pet. (U. S.) 72, 79. See, also, *Drum v. 133 Mass.* 566.

<sup>79</sup> See *Winters v. Mowrer*, 163 Pa. St. 239, 29 Atl. 916; *Connally v. Spragins*, 66 Ala. 258; *Matlock v. Wheeler*, 29 Ore. 64, 43 Pac. 867; *Stein v. Brunswick-Balke-Collender Co.* 69 Miss. 277, 13 So. 731; *Jourdan v. Boyce*, 33 Mich. 302; *King v. Bush*, 36 Ill. 142; *Young v. Cohen*, 42 S. Car. 328; *Conner v. Fleshman*, 4 W. Va. 693; *Ansley v. Peterson*, 30 Wis. 653; *Pen-*

*ny v. Corwithe*, 18 Johns. (N. Y.) 499; *Abel v. Fitch*, 20 Conn. 90; *Commonwealth v. McGurty*, 145 Mass. 257, 14 N. E. 98; *Page v. Danaher*, 43 Wis. 221; *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904.

<sup>80</sup> *Agawam Bank v. Sears*, 4 Gray (Mass.) 95. It is difficult, however, to fully reconcile this case with *Winters v. Mowrer*, 163 Pa. St. 239, 29 Atl. 916.

<sup>81</sup> *Connally v. Spragins*, 66 Ala. 258.

a fraud had been practiced upon him by the mortgagee in filling the blanks, and whether he had estopped himself to set up the improper filling of the blanks.<sup>82</sup> But in an action on a policy of insurance, where a recovery was resisted on the ground that an alteration had been made extending the life of the policy, it was held that the exclusion of evidence of the minimum rate of the company existing at the time was harmless where the policy itself recited a payment of a consideration different from that which would have been payable at such rate for the term the policy should run as alleged by the company and from that due at such rate for the term stated on the face of the policy.<sup>83</sup>

§ 1511. **Parol evidence.**—The rule which forbids the admission of parol evidence to vary a written contract has no application to evidence offered to show a fraudulent or an unauthorized alteration in a written instrument, and relevant parol evidence is admissible to impeach such an instrument on that ground.<sup>84</sup> So, such evidence has been received to show that blanks were improperly filled in contrary to directions.<sup>85</sup> And so, on the other hand, such evidence is admissible to explain an apparent alteration and to show that the change, if any, was made under such circumstances as not to vitiate or avoid the instrument.<sup>86</sup> Indeed, it may be stated as a general rule, that parol evidence is admissible in a proper case to prove when, by whom and under what circumstances an alteration was made,<sup>87</sup> or,

<sup>82</sup> *Smith v. Jagoe*, 172 Mass. 538, 52 N. E. 1088. See, also, *Winters v. Mower*, 163 Pa. St. 239, 29 Atl. 916.

<sup>83</sup> *Insurance Co. of N. A. v. Brim*, 111 Ind. 281, 12 N. E. 315.

<sup>84</sup> *Johnson v. Pollock*, 58 Ill. 181; *Coit v. Churchill*, 61 Iowa, 296, 16 N. W. 147; *Perry v. Burton*, 31 La. Ann. 262; *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111; *Everman v. Robb*, 52 Miss. 653; *Sweet v. Maupin*, 65 Mo. 65; *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187; *Wren v. Fargo*, 2 Ore. 19.

<sup>85</sup> *Richards v. Day*, 137 N. Y. 183, 33 N. E. 146, 33 Am. St. 704, 23 L. R. A. 601.

<sup>86</sup> *Stringham v. Oshkosh*, 22 Wis. 326; *Low v. Merrill*, 1 Pin. (Wis.)

340; *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58; *Crawford v. Brady*, 35 Ga. 184; *Williams v. Waters*, 36 Ga. 454; *Austin v. Boyd*, 24 Pick. (Mass.) 64; *Edelin v. Sanders*, 8 Md. 118; *Speake v. United States*, 9 Cranch (U. S.) 28.

<sup>87</sup> *Bowe v. Dotterer*, 80 Ga. 50, 4 S. E. 253; *Burton v. Pressly*, 1 Cheves Eq. (S. Car.) 1; *Monchet v. Cason*, 1 Brev. (S. Car.) 307; *Schneider v. Rapp*, 33 Ind. 270; *Bernstein v. Ricks*, 20 La. Ann. 409; *Rape v. Westcott*, 18 N. J. L. 244; *Smith v. Jagoe*, 172 Mass. 538, 52 N. E. 1088; *Hunter v. Parsons*, 22 Mich. 96. See *Ofenstein v. Bryan*, 20 D. C. App. 1; *Batchelder v. Blake*, 70 Vt. 197, 40 Atl. 34.

ordinarily, to explain its purpose.<sup>88</sup> And it has also been held that it may be admissible to show that an erasure is immaterial.<sup>89</sup>

**§ 1512. Collateral writings and transactions.**—Collateral writings are admissible when they are connected with the transaction in such a way as to throw light upon the issue as to the alteration of the instrument in question.<sup>90</sup> So even an immaterial alteration may be relevant and admissible upon the main issue of a material alteration.<sup>91</sup> But evidence that other writings were altered even though executed at or about the same time is generally inadmissible.<sup>92</sup>

In a recent case, several questions similar to those above referred to were decided. It was an action by the holder of a note, which had been materially altered, against the parties thereto. The court held that confessions of one of the parties that he had altered other notes relating to the same transaction for which the note in suit was given were inadmissible on behalf of the other defendants, unless made so by other evidence in the case. So, it was held that the fact that a meeting had been attended by the parties other than the one who they claimed had altered it, with a view to arranging for the payment of other notes claimed to have been altered by the same party, was not relevant, unless as a necessary introduction to admissions, made by the defendants in the course thereof, of authority to make the alteration, or that such had been made with their knowledge and consent. It was also held that evidence of

<sup>88</sup> *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St. 773; *Stringham v. Oshkosh*, 22 Wis. 326; *Johnson v. Wabash, &c. R. Co.* 16 Ind. 389; *Jenkinson v. Monroe*, 61 Mich. 454, 28 N. W. 663.

<sup>89</sup> See *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147.

<sup>90</sup> *Carlisle v. People's Bank*, 122 Ala. 446, 26 So. 115; *Cook v. Moulton*, 59 Ill. App. 428; *Perry v. Burton*, 31 La. Ann. 262; *Stein v. Brunswick-Balke-Collender Co.* 69 Miss. 277, 13 So. 731; *Rankin v. Blacknell*, 2 Johns. Cas. (N. Y.) 198.

<sup>91</sup> *Moye v. Herndon*, 30 Miss. 110.

So, a copy or duplicate is often admissible to show or to be used in determining whether the original was altered. *Conner v. Fleshman*, 4 W. Va. 693. See, also, *Young v. Cohen*, 42 S. Car. 328, 20 S. E. 62; *Ansley v. Peterson*, 30 Wis. 653.

<sup>92</sup> *Booth v. Powers*, 56 N. Y. 22 (Folger, J., however, dissenting); *Winter v. Pool*, 100 Ala. 503, 14 So. 411; *Paramore v. Lindsly*, 63 Mo. 63; *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904; *Thompson v. Moseley*, 5 Car. & P. 501, 24 E. C. L. 676. See, also, *Ofenstein v. Bryan*, 20 D. C. App. 1.



previous financial transactions between one of the makers, who was claimed to have altered the note, and the other parties to the note, was admissible only as the foundation for other evidence tending to show that authority had been given to such maker by the other parties to alter the note, or that, with knowledge of the alteration, they had admitted its genuineness and promised to pay it to the holder. It being sought to be shown that one of the makers who had altered and negotiated it had authority to alter it from the other parties to the note, testimony of a witness that he had seen blank notes in the possession of the party who had altered and negotiated the note, with what he believed to be the genuine signature of an indorser, was held to have been properly excluded, as seeking to establish one inference from another. It was, however, held to be error to refuse to allow a witness to be asked whether he was ever present in the office of the party charged with altering the note when he used acid in altering any notes, the plaintiff having stated that he expected to prove by the witness that he saw this done in the presence of the other parties to the note. And it was finally held that as expert testimony had been offered tending to show the apparent use of a certain ink eradicator in the alteration, testimony tending to show that bottles of such eradicator had been found in the desk of the party charged with having altered the note was admissible.<sup>93</sup>

§ 1513. **Declarations and admissions.**—It has been held that the affidavit of a party seeking to recover under an instrument will not be received to prove that an alteration therein was made through error or mistake, as this must be shown by legal evidence and not by the declaration of the party seeking to recover.<sup>94</sup> So upon a defense of an unauthorized alteration, it has been held that a memorandum as to dates, amount and time of payment, made by the payee at the time of indorsement, is not admissible where the witness can testify from his own knowledge and recollection.<sup>95</sup> Upon an issue as to an alteration set up by a defendant statements made by one who signed before the defendant, upon delivery of the instrument in his absence, have been held inadmissible against such defendant;<sup>96</sup> and so, on the other hand, it has been held that a defendant cannot testify to a con-

<sup>93</sup> *Ofenstein v. Bryan*, 20 D. C. App. 1.

<sup>94</sup> *Slocomb v. Watkins*, 1 Rob. (La.) 214.

<sup>95</sup> *National, &c. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408.

<sup>96</sup> *Hollis v. Vandergrift*, 5 Houst. (Del.) 521. But see *Krause v. Meyer*, 32 Iowa, 566.

versation between himself and another defendant in the absence of the plaintiff, concerning a particular provision which he claims was not in the note when it was executed.<sup>97</sup> And a professional and privileged communication to an attorney offering to confess judgment on the instrument if he so advised has been refused admission.<sup>98</sup> But, in many instances, declarations, admissions and conduct bearing upon the issue of alteration may be material and relevant and properly admissible.<sup>99</sup> Thus, evidence of a declaration or admission of the plaintiff that nothing was due has been received on the issue of fraudulent alteration of the amount of a note;<sup>100</sup> and so, to rebut evidence of alteration evidence has been held admissible of a willingness on the part of the maker of a note to ratify an alleged alteration and to admit the validity of the instrument.<sup>101</sup>

**§ 1514. Expert and opinion evidence.**—It has been held that a duly qualified expert may testify as to whether an instrument has been altered,<sup>102</sup> at least unless the alteration is apparent on the face of the paper.<sup>103</sup> So, it has been held that he may testify as to whether, in his opinion, it was made before or after the rest of the instrument was written,<sup>104</sup> whether interlineations are in the same handwriting as the rest of the paper,<sup>105</sup> whether it was all written with the same ink, and the like.<sup>106</sup> But it has also been held that

<sup>97</sup> *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290.

<sup>98</sup> *Bowers v. Briggs*, 20 Ind. 139.

<sup>99</sup> *Jenkinson v. Monroe*, 61 Mich. 454, 28 N. W. 663; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340; *Curtice v. West*, 50 Hun (N. Y.) 47, 2 N. Y. Supp. 507; *North v. Henneberry*, 44 Wis. 306. But see *Capen v. Crowell*, 63 Me. 455; *Jones v. Julian*, 12 Ind. 274.

<sup>100</sup> *Winters v. Mowrer*, 163 Pa. St. 239, 29 Atl. 916.

<sup>101</sup> *Booth v. Powers*, 56 N. Y. 22.

<sup>102</sup> *Hendrix v. Gillett*, 6 Colo. App. 127, 39 Pac. 896; *Nelson v. Johnson*, 18 Ind. 329; *Vinton v. Peck*, 14 Mich. 287; *Hadcocke v. O'Rourke*, 6 N. Y. Supp. 543; *Moye v. Herndon*, 30 Miss. 110; *Ballentine v. White*, 77 Pa. St. 20.

<sup>103</sup> See *Stillwell v. Patton*, 108

Mo. 352, 18 S. W. 1075; *Johnson v. Van Name*, 51 Hun (N. Y.) 644, 4 N. Y. Supp. 523.

<sup>104</sup> *Dubois v. Baker*, 30 N. Y. 355; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Phoenix, &c. Ins. Co. v. Philip*, 13 Wend. (N. Y.) 81. See, also, *Charles T. Hayden, &c. Co. v. Lewis (Ariz.)*, 32 Pac. 263; *Rass v. Sebastian*, 160 Ill. 602, 43 N. E. 708; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Cooper v. Brockett*, 4 Moore P. C. 433. But compare *Jewett v. Draper*, 6 Allen (Mass.) 434; *Cheney v. Dunlap*, 20 Neb. 265, 29 N. W. 925.

<sup>105</sup> *Graham v. Spang (Pa.)*, 18 Atl. 91; *Hawkins v. Grimes*, 13 B. Mon (Ky.) 257. See, also, *Reg. v. Williams*, 8 Car. & P. 434.

<sup>106</sup> *Glover v. Gentry*, 104 Ala. 222, 16 So. 38; *National, &c. Bank v.*

it is not error to permit an ordinary witness, who has not qualified as an expert, to testify that there has been an erasure where it can be plainly seen that such is the case.<sup>107</sup>

§ 1515. **Transactions with persons since deceased.**—The provision found in the statutes of most of the states to the effect that parties shall not testify to personal transactions with persons since deceased, under certain circumstances, has been held to extend to testimony of one of the parties as to the alteration of an instrument and its condition at the time of its execution where the other party has since died.<sup>108</sup> It was so held even where the witness had no interest as to the particular point to which the proposed testimony referred.<sup>109</sup> But it has been held by the same court that the statute did not forbid testimony of the maker of a note as to its true date, in respect to which it appeared to have been altered.<sup>110</sup> So, a question as to when and with what ink the defendant signed a note, and whether he struck out the words 'claimed to have' been erased or altered, has been held proper as not calling for evidence of a personal transaction with the deceased.<sup>111</sup>

§ 1516. **Questions of law and fact—Province of court and jury.**—Whether an alteration is material is a question of law for the court.<sup>112</sup> It is equally well settled that generally the question as to whether an alteration has been made is a matter to be determined by the jury. "Where the instrument is submitted to them, either

Rising, 4 Hun (N. Y.) 793; *Farmers', &c. Bank v. Young*, 36 Iowa, 45; *Porell v. Cavanaugh*, 69 N. H. 364, 41 Atl. 860; *Eisfield v. Dill*, 71 Iowa, 442, 32 N. W. 420.

<sup>107</sup> *Yates v. Waugh*, 46 N. Car. 483.

<sup>108</sup> *In re Brown's Estate* (Cole v. Marsh), 92 Iowa, 379, 60 N. W. 659; *Benton Co. Sav. Bank v. Strand*, 106 Iowa, 606, 76 N. W. 1001; *Mitchell v. Woodward*, 2 Marv. (Del.) 311, 43 Atl. 165; *Church v. Howard*, 17 Hun (N. Y.) 5, 8. See, also, *Harris v. Bank*, 22 Fla. 501, 1 So. 140; *Gist v. Gans*, 30 Ark. 285; *Foster v. Collner*, 107 Pa. St. 305; *Pyle v. Oustall*, 92 Ill. 209. In *Harris v. Bank*, *supra*, the

rule was applied where a partnership was interested, but the transaction was with an individual member who had since died.

<sup>109</sup> *Williams v. Barrett*, 52 Iowa, 637, 3 N. W. 690.

<sup>110</sup> *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58, 58 Am. R. 218. But compare *In re Brown's Estate* (Cole v. Marsh), 92 Iowa, 379, 60 N. W. 659.

<sup>111</sup> *Page v. Danaher*, 43 Wis. 221. See, also, *Gist v. Gans*, 30 Ark. 285.

<sup>112</sup> *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Heard v. Tapan*, 116 Ga. 930, 43 S. E. 375; *Belfast Bank v. Harriman*, 68 Me. 522; *Keen v. Monroe*, 75 Va. 424; *Pritchard v. Smith*, 77 Ga. 463.

with or without explanation, the appearance of the document, the possible motive for or against the alteration, the advantage or disadvantage to the party claiming under the instrument which would be likely to follow from an alteration, are all circumstances from which the jury may determine the fact of alteration, as well as the time and intent.<sup>113</sup> While there are numerous cases in which it has been held that instruments in which the alteration was manifest from their face, as from difference in ink or handwriting, might be submitted to the jury without any explanation,<sup>114</sup> yet it is clearly the safer and better practice for the person relying on such an instrument to give evidence explaining the same, if possible; and in many cases this has been held indispensable.<sup>115</sup> When the maker testifies that an alteration has been made, it is clearly a question for the jury.<sup>116</sup> So, whether the change was made before or after execution,<sup>117</sup> by whom it was made,<sup>118</sup> and whether

<sup>113</sup> *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Heffelfinger v. Shutz*, 16 S. & R. (Pa.) 44; *Commissioners v. Hanlon*, 1 Nott & McC. (S. Car.) 554; *Ault v. Fleming*, 7 Iowa, 143; *Commercial Bank v. Lum*, 8 Miss. 414; *Maybee v. Sniffin*, 2 E. D. Smith (N. Y.) 1; *Schwarz v. Herrenkind*, 26 Ill. 208; *Stockton v. Graves*, 10 Ind. 294; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Dodge v. Haskell*, 69 Me. 429; *Cole v. Hills*, 44 N. H. 227; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Mathews v. Coalter*, 9 Mo. 705; *Martin v. Klein*, 157 Pa. St. 473; *Pearson v. Hardin*, 95 Mich. 360; *Courcamp v. Weber*, 39 Neb. 533.

<sup>114</sup> *Cole v. Hills*, 44 N. H. 227; *Wicker v. Pope*, 12 Rich. (S. Car.) 387, 75 Am. Dec. 732; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. R. 232.

<sup>115</sup> *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Davis v. Jenny*, 1 Met. (Mass.) 223; *Commercial Bank v. Lum*, 8 Miss. 414; *Warren v. Layton*, 3 Har. (Del.) 404; *Stoner v.*

*Ellis*, 6 Ind. 159; *Fontaine v. Gunther*, 31 Ala. 258; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Clark v. Eckstein*, 22 Pa. St. 507, 62 Am. Dec. 307; *Page v. Danaher*, 43 Wis. 221.

<sup>116</sup> *Jones Ev.* § 580; *Von Eherenkrook v. Webber*, 100 Mich. 314, 58 N. W. 665. See, also, *Martin v. Kline*, 157 Pa. St. 473, 27 Atl. 753.

<sup>117</sup> *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103; *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202; *Norwood v. Fairservice*, Quincy (Mass.) 189; *Wilson v. Henderson*, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716; *Beach v. Heck*, 54 Mo. App. 599; *Lamb v. Briggs*, 22 Neb. 138, 34 N. W. 217; *Mosher v. Davis*, 41 N. Y. App. Div. 622, 58 N. Y. Supp. 529.

<sup>118</sup> *Millikin v. Marlin*, 66 Ill. 13; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467; *Artisans' Bank v. Backus*, 31 How. Pr. (N. Y.) 242; *Martin v. Kline*, 157 Pa. St. 473, 27 Atl. 753, Week. No. Cas. (Pa.) 323,

it was made with or without consent,<sup>119</sup> are all usually questions for the jury.

**§ 1517. Weight and sufficiency of evidence—Inspection.**—As shown in the last preceding section, the question as to whether there has been an alteration is for the jury. It is to be determined by a preponderance of the evidence;<sup>120</sup> but mere suspicion of an alteration is not sufficient to relieve one from liability on an instrument, at least where it is fair on its face.<sup>121</sup> In most, if not all, jurisdictions the jury may inspect the instrument and decide from this and all the evidence in the case as to whether there has been an alteration, and, if so, when and by whom.<sup>122</sup> In some jurisdictions it is held that mere inspection alone may furnish sufficient evidence of alteration,<sup>123</sup> but in others the opposite view is taken.<sup>124</sup>

*Ramsey v. McCue*, 21 Gratt. (Va.) 349; *Whitfield v. Collingwood*, 1 C. & K. 325, 47 E. C. L. 325.

<sup>119</sup> *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *De Long v. Soucie*, 45 Ill. App. 234; *Cornell v. Nebeker*, 48 Ind. 463; *Belfast Nat. Bank v. Harriman*, 68 Me. 522; *Wilson v. Henderson*, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716; *Briggs v. Glenn*, 7 Mo. 572; *Wilson v. Jamisson*, 7 Pa. St. 126; *Jacobs v. Gilreath*, 45 S. Car. 46, 22 S. E. 757; *Keen v. Monroe*, 75 Va. 424; *North v. Henneberry*, 44 Wis. 306; *Whitfield v. Collingwood*, 1 C. & K. 325, 47 E. C. L. 325.

<sup>120</sup> *Glover v. Gentry*, 104 Ala. 222, 16 So. 38; *Longwell v. Day*, 1 Mich. N. P. 286; *Coit v. Churchill*, 61 Iowa, 296, 16 N. W. 147.

<sup>121</sup> *Austin v. Austin*, 45 Wis. 523. But compare *Lamar v. Brown*, 56 Ala. 157; *Wilson v. Fulliam*, 50 Iowa, 123; *Burton v. Pressly*, *Cheves Eq. (S. Car.)* 1.

<sup>122</sup> *Milliken v. Marlin*, 66 Ill. 13; *Pearson v. Hardin*, 95 Mich. 360, 54

N. W. 904; *Dodge v. Haskell*, 69 Me. 429; *Martin v. Tuttle*, 80 Me. 310, 14 Atl. 207; *Domville v. Davies*, 13 Nova Scotia, 159.

<sup>123</sup> See *Davis v. Carlisle*, 6 Ala. 707; *Dodge v. Haskell*, 69 Me. 429; *Noah v. German Ins. Co.* 69 Mo. App. 332; *Kennedy v. Moore*, 17 S. Car. 464. See, also, and compare *Ely v. Ely*, 6 Gray (Mass.) 439 with *Simpson v. Davis*, 119 Mass. 269, 20 Am. R. 324, and *Taylor v. Moseley*, 6 C. & P. 273, 25 E. C. L. 429, with *Knight v. Clements*, 8 Ad. & El. 215, 35 E. C. L. 559.

<sup>124</sup> *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452; *Sheldon v. Hawes*, 15 Mich. 519; *Cole v. Hills*, 44 N. H. 227; *Rankin v. Blackwell*, 2 Johns. Cas. (N. Y.) 198; *Page v. Danaher*, 43 Wis. 221; *Knight v. Clements*, 8 Ad. & El. 215, 35 E. C. L. 559; *Clifford v. Parker*, 2 M. & G. 909, 40 E. C. L. 917. See, also, *Thrasher v. Anderson*, 45 Ga. 538; *Runnion v. Crane*, 4 Blackf. (Ind.) 466; *Shelton v. Reynolds*, 111 N. Car. 526, 16 S. E. 272.

## CHAPTER LXXIII.

### WEIGHT AND EFFECT OF DOCUMENTARY EVIDENCE.

Sec.		Sec.	
1518.	Generally—Scope of chapter.	1528.	Judgment must be final and on merits.
1519.	Distinction between doctrine of collateral attack and res adjudicata.	1529.	Matters in issue—Extrinsic evidence.
1520.	Rule where subject matter is different.	1530.	Judgments in rem.
1521.	Where cause of action is the same—Res adjudicata.	1531.	Judgments in divorce cases.
1522.	General rule as to effect of judgments.	1532.	Probate proceedings.
1523.	Parties and privies.	1533.	Showing want of jurisdiction.
1524.	Persons controlling proceedings.	1534.	Foreign judgments.
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1526.	Warrantors and others notified to defend.	1536.	Fraud in procuring or altering domestic judgments.
1527.	Principal and surety—Bonds.	1537.	Estoppel by verdict—Appeal—Non-suit.
		1538.	Estoppel by deed.
		1539.	Miscellaneous.

§ 1518. **Generally—Scope of chapter.**—It is the purpose in this chapter to treat of the subject of the weight and effect of documentary evidence generally, and especially of judgments and judicial records with reference to the doctrines of estoppel, res adjudicata or former adjudication, and collateral attack. The manner of proving such records has already been considered. Many of the rules on the general subject are rules of substantive law, and it is not within the scope of this work to treat them in detail, but an attempt will be made to treat the subject briefly, in so far at least as it belongs in any sense to the domain of the law of evidence.

It is necessary to a proper understanding of the subject to first call attention to certain distinctions which are often overlooked, and this will be done in the sections that immediately follow.

**§ 1519. Distinctions between doctrine of collateral attack and res adjudicata.**—In a well known text book it is said: “The use of a prior adjudication as evidence in a new action involves either the doctrine of collateral attack or that of res judicata. If the two actions concern the same subject-matter, or if the prior adjudication tends to establish a link in the chain of title to the subject-matter embraced in the new action, an objection to its competency is a collateral attack; but if the actions involve different subject-matters, an objection raises the question of res judicata. The doctrine of collateral attack denies any validity whatever to the former adjudication, while that of res judicata admits its entire validity and simply denies the scope claimed for it. There is little similarity between the two doctrines. Collateral attack involves the jurisdiction of the court, and denies its power to act at all, while res judicata merely involves the question concerning what was contested on the trial. A judgment on default, without any issue joined or contest made, is just as invulnerable against a collateral attack as one rendered on issue joined after a contest. On the contrary, the doctrine of res judicata cannot rise except by virtue of some issue joined and actually contested on the trial.”<sup>1</sup>

As to collateral attack, the same author states the general rule as follows: “Jurisdiction existing, any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority.” As to res adjudicata he states the general rule as follows: “Jurisdiction existing, a final judgment on the merits conclusively settles the entire cause of action sued upon and all causes of defense, whether brought forward or not; and also settles all matters in issue actually contested and decided, so as to make them conclusive evidence in any other judicial proceeding between the same parties.”<sup>2</sup>

**§ 1520. Rule where subject matter is different.**—There is an important distinction and a material difference between the effect of a judgment as a bar or estoppel against the prosecution of a sec-

<sup>1</sup> Van Fleet Collateral Attack, 15, § 17.

<sup>2</sup> Van Fleet Collateral Attack, 29, § 17.

ond action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action and involving a different subject matter. In the former case, as will be shown in the next section, a judgment on the merits is a finality and an absolute bar as against parties and privies, not only as to what was actually proved, but as to everything that was admissible and ought to have been litigated under the issues. But where the second action relates to a different subject matter, and is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to such matters in issue or controverted points as were therein actually determined; and in the latter case the question is as to what was actually litigated, and not what might have been litigated and determined.<sup>3</sup> Thus, it is said by the Supreme Court of the United States: "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."<sup>4</sup> So, a former judgment does not constitute an estoppel as to matters that could not have been in issue, such, for instance, as matters that occur subsequently to its rendition and give an entirely new right of title.<sup>5</sup>

<sup>3</sup> *Ætna Life Ins. Co. v. Board*, 117 Fed. 82, 54 C. C. A. 468 (stating the distinction and laying down the rules substantially as in the text); *Cromwell v. Sac County*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Brady v. Pinal County (Ariz.)*, 71 Pac. 910; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75; *Vaughn v. Morrison*, 55 N. H. 580; *Goode-now v. Litchfield*, 59 Iowa, 226; *Foye v. Patch*, 132 Mass. 110; *Nes-bit v. Independent District of Riverside*, 144 U. S. 610; *Bernard v. Hoboken*, 27 N. J. L. 412; *Burwell*

*v. Canday*, 3 Jones (N. Car.) 165; *Bridger v. Asheville R. Co.* 27 S. Car. 456, 13 Am. St. 653; *Kilander v. Hoover*, 111 Ind. 10; *Danziger v. Williams*, 91 Pa. St. 234; *Furneau v. First Nat. Bank*, 39 Kans. 144. See note, 96 Am. Dec. 784; *Moore v. Snowball (Tex.)*, 81 S. W. 5.

<sup>4</sup> *Cromwell v. Sac County*, 94 U. S. 351, 353, 356.

<sup>5</sup> *Keokuk, &c. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592; *Barrows v. Kindred*, 4 Wall. (U. S.) 399; *Hawley v. Simons*, 102 Ill. 115; *People's Sav. Bank v. Hodgdon*, 64



§ 1521. **Where cause of action is the same—Res adjudicata.**—As a general rule where the cause of action is the same, a final judgment is conclusive against parties and privies in a former adjudication, not only as to matters which the court actually decided, but as to matters properly belonging to the subject of the litigation, and which might have been admitted and litigated under the issues.<sup>6</sup> This rule is often applied so as to prevent a splitting<sup>7</sup>

Cal. 95; *McLane v. Bovee*, 35 Wis. 27; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75; *Gluckauf v. Reed*, 22 Cal. 468; *Ramsey Bldg. Soc. v. Lawton*, 49 Minn. 362; *Dwyer v. Goran*, 29 Iowa, 126; *Neafie v. Neafie*, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; *Stone v. St. Louis Stamping Co.* 155 Mass. 267; *Perkins v. Parker*, 10 Allen (Mass.) 22; *Morse v. Marshall*, 97 Mass. 519; *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187, and note. See, also, *State v. Bechdel*, 37 Minn. 360, 5 Am. St. 854; *Belshe v. Batdorf*, 98 Mo. App. 627, 73 S. W. 888.

<sup>6</sup> *Fischli v. Fischli*, 1 Blackf. (Ind.) 360; *Thomas v. Thompson*, 149 Ind. 391, 49 N. E. 268; *Steves v. Frazee*, 19 Ind. App. 284, 49 N. E. 385; *Henderson v. Henderson*, 3 Hare, 115; *Farquharson v. Seton*, 5 Russ. 45; *Partridge v. Usborne*, 5 Russ. 195; *Chamley v. Lord Dunsany*, 2 Schoales & L. 718; *Kaehler v. Dobberpuhl*, 60 Wis. 256; *Pennock v. Kennedy*, 153 Pa. St. 579; *Danaher v. Prentiss*, 22 Wis. 316; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Miller v. Covert*, 1 Wend. (N. Y.) 487; *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Hill v. Joy*, 149 Pa. St. 243; *Willard v. Sperry*, 16 Johns. (N. Y.) 121; *Bowe v. Minnesota Milk Co.* 44 Minn. 460; *Baker v. Stinchfield*, 57 Me. 363; *Beronio v. Southern Pac. R. Co.* 86 Cal.

415; *Burford v. Kersey*, 48 Miss. 642; *Wickersham v. Whedon*, 33 Mo. 561; *Bassett v. Connecticut River Co.* 150 Mass. 178; *Thislor v. Miller*, 53 Kans. 515; *Le Guen v. Gouverneur*, 1 Johns. (N. Y.) 436, 1 Am. Dec. 121; *Dees Moines, &c. R. Co. v. Bullard*, 89 Iowa, 749; *Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 325; *Bailey v. Bailey*, 115 Ill. 551; *Ætna Life Ins. Co. v. Board*, 117 Fed. 82, 54 C. C. A. 468; *Werlein v. City of New Orleans*, 177 U. S. 401, 20 Sup. Ct. 682; notes in 78 Am. Dec. 760, and 15 Am. St. 142.

<sup>7</sup> *Mallory v. Dawson Cotton, &c. Co.* (Tex. Civ. App.), 74 S. W. 953; *Burdge v. Kelchner*, 66 Kans. 642, 72 Pac. 232; *Guernsey v. Carver*, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; *Borngesser v. Harrison*, 12 Wis. 544, 78 Am. Dec. 757; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; *Avery v. Fitch*, 4 Conn. 362; *Lucas v. Le Compte*, 42 Ill. 303; *Memmer v. Carey*, 30 Minn. 458; *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 228; *Ingraham v. Hall*, 11 S. & R. (Pa.) 78; *Pittman v. Chrisman*, 42 Ill. 303; *Pittman v. Chrisman*, 59 Miss. 124; *Bolen Coal Co. v. Whittaker Co.* 52 Kans. 747; *Magruder v. Randolph*, 77 N. Car. 79. But see *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; *Cunnington v. Wareham*, 9 Cush. (Mass.) 590. A different rule applies where the transactions or

of demands. It also applies to defendants as well as to plaintiffs.<sup>8</sup>

**§ 1522. General rule as to effect of judgments.**—It has been stated in general terms that judicial records import absolute verity,<sup>9</sup> and it is said that such a record is always admissible to prove the fact that a judgment has been rendered, the time of its rendition, and the terms and effect of the judgment.<sup>10</sup> Not only may judgments be shown in evidence in a proper case, between parties and privies, in subsequent actions, but they may also be conclusive evidence. Indeed, it is the general rule that when a matter has been adjudicated and finally determined by a competent tribunal, such determination is conclusive as between the parties and their privies. If the court has jurisdiction of the subject matter and the parties, its final decision is conclusive between them and their privies as to the matter determined until set aside on appeal or in some other mode recognized by the law.<sup>11</sup> If jurisdiction exists, no matter

sales are separate and independent of each other. *American Machine Co. v. Thornton*, 28 Minn. 418; *Terrier v. Jutte*, 159 Pa. St. 244; *Secor v. Sturgis*, 16 N. Y. 541; *Schmidt v. Zahensdorf*, 30 Iowa, 498.

<sup>8</sup> *Wilcox v. Gibbs Sewing Machine Co.* 123 Fed. 875; *Cromwell v. Sac County*, 94 U. S. 351; *Newman v. Gates* (Ind. App.), 67 N. E. 468; *Hanover v. Kilander*, 135 Ind. 600, 34 N. E. 697; *Pearl v. Wells*, 6 Wend. (N. Y.) 291, 21 Am. Dec. 328; *Kelly v. Donlin*, 70 Ill. 378; *Howe v. Lewis*, 121 Ind. 110; *Shaffer v. Scuddy*, 14 La. Ann. 575; *Barksdale v. Greene*, 29 Ga. 419; *Footman v. Stetson*, 32 Me. 17; *Hackworth v. Zollars*, 30 Iowa, 433; *Dodd v. Scott*, 81 Iowa, 319; *Dowell v. Applegate*, 152 U. S. 327.

<sup>9</sup> *Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. 335, 336; *Wilkerson v. Schoonmaker*, 77 Tex. 615, 19 Am. St. 803; *Rex v. Carlile*, 2 B. & Ad. 362, 22 E. C. L. 96; *Sintzewick v. Lucas*, 1 Esp. 44, and

numerous authorities hereinafter cited.

<sup>10</sup> 24 Am. & Eng. Ency. of Law, 192, citing: *Commonwealth v. McPike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; *Splahn v. Gillespie*, 48 Ind. 397; *Taylor v. Williams*, 120 Ind. 414, 22 N. E. 118; *Jones v. Talbot*, 9 Mo. 121; *McMichael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560; *Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Leggatt v. Tollewey*, 14 East, 302; *Rex v. Norman*, 4 C. B. 884, 56 E. C. L. 884, and numerous other cases.

<sup>11</sup> *Haines v. Flinn*, 26 Neb. 380, 42 N. W. 91, 18 Am. St. 785, and note; *Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703, 20 Am. St. 183, and note; *North-western Bank v. Hays*, 37 W. Va. 475; *Archbishop v. Shipman*, 69 Cal. 586; *Strayer v. Johnson*, 110 Pa. St. 21; *Woods v. Montevallo Co.* 84 Ala. 560, 5 Am. St. 393; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. 131; *Gardner v. Buckbee*, 3 Cow. (N. Y.) 120, 15 Am. Dec.

whether the judgment is correct or erroneous, just or unjust, it cannot be collaterally attacked.<sup>12</sup>

§ 1523. **Parties and privies.**—"Under the term parties," says Mr. Greenleaf in this connection, "the law includes all who are directly interested in the subject matter and have a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine the witnesses attesting on the other side. Persons not having these rights are regarded as strangers to the cause."<sup>13</sup> He also says that "the term privy denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest, and whenever this identity is found to exist all are alike concluded."<sup>14</sup> A common illustration of the binding effect of judgments because of the privy of the parties is where judgments have been rendered against decedents during their lives. In such cases such judgments are usually binding on their executors or administrators and upon their heirs, lega-

256; *Peay v. Duncan*, 20 Ark. 85; *Lore v. Truman*, 10 Ohio St. 45; *Wales v. Lyon*, 2 Mich. 276; *Newton v. Marshall*, 62 Wis. 8; *Castle v. Noyes*, 14 N. Y. 329; *Finney v. Boyd*, 26 Wis. 366; *Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377; *Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 869; *Bateman v. Miller*, 118 Ind. 345, 21 N. E. 292; *Sanford v. Oberlin College*, 50 Kans. 342; *Lazarus v. Phelps*, 156 U. S. 202; *Locke v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East 353; *Rex v. Mayor of York*, 5 Term. 66. See notes, 23 Am. St. 103; 82 Am. Dec. 411; 96 Am. Dec. 775-788; 14 Am. St. 250; 15 Am. St. 142; 41 Am. Dec. 681; 7 L. R. A. 577-582.

<sup>12</sup> *Morrill v. Morrill*, 20 Ore. 96, 25 Pac. 362, 23 Am. St. 95, and extended note; note in 15 Am. St. 142; *Wall v. Wall*, 28 Miss. 409; *Parish v. Ferris*, 2 Black (U. S.) 606;

*Foster v. Wells*, 4 Tex. 101; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *La Grange v. Ward*, 11 Ohio, 257; *Peay v. Duncan*, 20 Ark. 85; *Housemire v. Moulton*, 15 Ind. 367; *Hart v. Jewett*, 11 Iowa, 276; *Wallace v. Usher*, 4 Bibb (Ky.) 508; *Lefebore v. DeMontilly*, 1 La. Ann. 42; *Vandyke v. Bastedo*, 15 N. J. L. 224; *Page v. Esty*, 54 Me. 319; *Wingate v. Haywood*, 40 N. H. 437; *Hibshman v. Dulleban*, 4 Watts (Pa.) 183; *Kelley v. Nize*, 3 Sneed (Tenn.) 59; *Dick v. Webster*, 6 Wis. 481; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; *Howell v. Ross* (Neb.), 94 N. W. 955; *Hadley v. Bourdeaux* (Minn.), 95 N. W. 1109; *Robinett v. Mitchell* (Va.), 45 S. E. 287; *Myers v. Pedigo* (Ky.), 72 S. W. 734.

<sup>13</sup> 1 Greenleaf Ev. § 523.

<sup>14</sup> 1 Greenleaf Ev. § 523.

tees or devisees.<sup>15</sup> Many additional illustrative cases are cited below.<sup>16</sup> But the judgments against administrators or executors are not conclusive against heirs or devisees,<sup>17</sup> except where, as in a few jurisdictions, an administrator or executor represents the heirs and devisees as well as the estate or creditors and next of kin.<sup>18</sup> Nor is the executor or administrator usually bound by a judgment against the heirs or distributees.<sup>19</sup> So, although a tenant is usually in privity with a landlord, and is bound by a recovery against the landlord, the landlord is not ordinarily bound by proceedings against the tenant<sup>20</sup> unless he assumes control of the case.<sup>21</sup> Other cases in which it was held that there was no such privity as bound persons who were not parties are cited below.<sup>22</sup>

§ 1524. **Persons controlling proceedings.**—Under the comprehensive meaning given to the term “parties,” as stated in the last preceding section, a judgment may be evidence and even conclusive

<sup>15</sup> *Torrey v. Pond*, 102 Mass. 355; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865; *Locke v. Norborne*, 3 Mod. 141.

<sup>16</sup> *Shotwell v. Lawson*, 30 Miss. 27, 64 Am. Dec. 145; *Haynes v. Calderwood*, 23 Cal. 409; *Loomis v. Riley*, 24 Ill. 307; *Green v. White*, 7 Blackf. (Ind.) 242; *McGregor v. McGregor*, 21 Iowa, 441; *Wickliffe v. Bascom*, 7 B. Mon. (Ky.) 681; *Thurston v. Spratt*, 52 Me. 202; *Inloe v. Harvey*, 11 Md. 519; *Steele v. Taylor*, 1 Minn. 274; *Commonwealth v. Dieffenbach*, 3 Grant (Pa.) 368; *Thompson v. McCormick*, 136 Ill. 135, 26 N. E. 373; *National Bank v. Sprague*, 21 N. J. Eq. 530; *Miller v. White*, 80 Ill. 580; *Smith v. Kernochen*, 7 How. (U. S.) 198; *Tootle, Hosea & Co. v. Otis* (Neb.), 95 N. W. 681; *Hurxthal v. St. Lawrence, &c. Co.* 53 W. Va. 87, 44 S. E. 520.

<sup>17</sup> *McCoy v. Nichols*, 5 Miss. 31; *Vernon v. Valk*, 2 Hill Ch. (S. Car.) 257; *Collinson v. Owens*, 6 Gill & J. (Md.) 4; *Robertson v. Wright*, 17 Gratt. (Va.) 534; *Early v. Garland*, 13 Gratt. (Va.) 1; *Dorr v. Stock-*

*dale*, 19 Iowa, 269; *Hazen v. Tillman*, 5 N. J. Eq. 363. But see *Sergeant v. Ewing*, 36 Pa. St. 156, 160; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745.

<sup>18</sup> *Shannon v. Taylor*, 16 Tex. 413; *Castellow v. Guilmartin*, 54 Ga. 299.

<sup>19</sup> *Dorr v. Stockdale*, 19 Iowa, 269; *Johnson v. Longmore*, 39 Ala. 143.

<sup>20</sup> *Wenman v. McKenzie*, 5 El. & B. 447; *Lochner v. Garborina* (Ind. Ter.), 64 S. W. 570; *State v. Morgans, &c. Co.* 106 La. Ann. 513, 31 So. 115; *Hart v. Meredith* (Tex. Civ. App.), 65 S. W. 507; *Chant v. Reynolds*, 49 Cal. 213; *Bartlett v. Boston Gas Co.* 122 Mass. 209.

<sup>21</sup> *Valentine v. Mahoney*, 37 Cal. 389; *Chirac v. Reinecker*, 2 Pet. (U. S.) 617. But see *Samuel v. Dinkins*, 12 Rich. L. (S. Car.) 172.

<sup>22</sup> *Kinney v. Eastern, &c. Co.* 123 Fed. 297; *Stacy v. Henke* (Tex. Civ. App.), 74 S. W. 925; *Lawson v. Dunn* (N. J. Eq.), 49 Atl. 1087; *Gardner v. Whitford* (R. I.), 50 Atl. 642; *Stone v. Stone*, 179 Mass. 555, 61 N. E. 268; *Cypreanson v. Berge*, 112 Wis. 260, 87 N. W. 1081.

as to matters thereby determined against one who was not a party to the record or a nominal party in the proceeding in which it was rendered if he controlled and directed the same.<sup>23</sup> So, generally, one who carries on or defends an action by employing counsel, paying costs and doing what is generally done by a party, will be bound by the judgment, although he is not a party to the record.<sup>24</sup> Nor is absolute identity as to the parties in the two actions always necessary as between those who were parties to both actions,<sup>25</sup> but in order that the judgment should be a bar on the ground that the parties are the same, it must usually appear that they sued or were sued in the same capacity.<sup>26</sup> For instance, if one sues in his own right as an individual and afterwards sues in a representative capacity as an administrator or the like, the former judgment is not usually a bar.<sup>27</sup>

<sup>23</sup> *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38; *Roby v. Eggers*, 130 Ind. 415, 29 N. E. 365; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260; *Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252; *Aslin v. Parkin*, 2 Burr. 668; *Hitchin v. Campbell*, 2 W. Black. 827; *Outram v. Morewood*, 3 East, 346; *Courtney v. William Knabe, & Co. (Md.)*, 53 Atl. 614; *Castle v. Noyes*, 14 N. Y. 329; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Peterson v. Lothrop*, 34 Pa. St. 223; *French v. Neal*, 24 Pick. (Mass.) 61; *Adams v. Barnes*, 17 Mass. 365; *Case v. Reeve*, 14 Johns. (N. Y.) 82; *Calhoun v. Dunning*, 4 Dall. (Pa.) 120; *Stokes v. Morrow*, 54 Ga. 597.

And that he did so, may be shown by parol. *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882; *Shugart v. Miles*, 125 Ind. 445.

<sup>24</sup> *Palmer v. Hayes*, 112 Ind. 289; *Case v. Moorman*, 25 Ind. App. 293, 58 N. E. 85; *McNamee v. Moreland*, 26 Iowa, 96; *Stoddard v. Thompson*, 31 Iowa, 80; *Wood v. Ensel*, 63 Mo. 193. But compare *Goodnow v. Litchfield*, 63 Iowa, 275; *Schroeder v. Lahrman*, 26 Minn. 87; *Hauks*

*Dental Asso. v. International Tooth Crown Co.* 122 Fed. 74, 58 C. C. A. 180.

<sup>25</sup> *Davenport v. Burnett*, 51 Ind. 329; *Larum v. Wilmer*, 35 Iowa, 244; *Tauziede v. Jumel*, 133 N. Y. 614; *State v. Krug*, 94 Ind. 366; *French v. Neal*, 24 Pick. (Mass.) 55; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; *Dows v. McMichael*, 6 Paige (N. Y.) 139; *Thompson v. Roberts*, 24 How. (N. Y.) 233; *Girardin v. Dean*, 49 Tex. 243. Contra: *Davis v. Hunt*, 2 Bailey (S. Car.) 412; *Nave v. Adams*, 107 Mo. 414.

<sup>26</sup> *Johnson v. Graves*, 129 Ind. 124, 28 N. E. 315; *Leggott v. Great Northern R. Co.* 1 Q. B. Div. 599; *Karr v. Parks*, 44 Cal. 46; *Collins v. Hydorn*, 135 N. Y. 320; *Brooking v. Dearmond*, 27 Ga. 58; *Lander v. Arno*, 65 Me. 26; *Downing v. Diaz*, 80 Tex. 436; *Landon v. Townshend*, 129 N. Y. 166. But see *Hartford Fire Ins. Co. v. King* (Tex. Civ. App.), 73 S. W. 71.

<sup>27</sup> Authorities cited in last note, *supra*.

§ 1525. **When conclusive as to strangers.**—As a general rule a stranger is not bound by a judgment in an action to which he was neither a party nor privy, and it cannot be used against him as a former adjudication;<sup>28</sup> but where there is jurisdiction and the judgment is not the result of fraud and collusion between the two parties, a record may be used to establish the fact of such judgment and the legal effect thereof, and cannot be collaterally attacked, even by strangers.<sup>29</sup> The rule is stated by Sir James Stephens as follows: "All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually affect when the existence of the state of things so affected is a fact in issue or is deemed to be relevant to the issue."<sup>30</sup> So, verdicts and judgments on questions of a public nature, where evidence of a general reputation would be received, have been admitted, although the parties were not the same nor in privy, but not as conclusive evidence;<sup>31</sup> and, as will hereafter be

<sup>28</sup> *Rex v. Kingston* (Duchess of Kingston's Case), 20 How. St. Tr. 355, 538; 2 *Van Fleet* Former Adj. § 909 et seq.; *Woods v. Montevallo, &c. Co.* 89 Ala. 560, 5 Am. St. 393; *Great West, &c. Co. v. Woodmas, &c. Co.* 12 Colo. 46, 13 Am. St. 204, and note; *Dewey v. St. Albans Trust Co.* 60 Vt. 1, 6 Am. St. 84.

Judgments in criminal cases where the state is prosecutor are generally held inadmissible to establish the facts of a civil case, and vice versa. *Smith v. Rummens*, 1 Campb. 9; *Hathaway v. Barrow*, 1 Campb. 151; *Jones v. White*, 1 Str. 68; *Brownsword v. Edwards*, 2 Ves. Sr. 246; *Morch v. Raubitschek*, 159 Pa. St. 559, 28 Atl. 369; *Marceau v. Travelers Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *Mead v. Boston*, 3 Cush. (Mass.) 404; *Betts v. New Hartford*, 75 Conn. 180; *Corbly v. Wilson*, 71 Ill. 209, 22 Am. R. 98; *Steel v. Cazeaux*, 8 Mart. (La.) 318, 13 Am. Dec. 288; *Cluff v. Mutual B. L. Ins. Co.* 99 Mass. 317; *Cottingham v. Weeks*, 54 Ga. 275.

<sup>29</sup> *Maple v. Beach*, 43 Ind. 51;

*Ham v. Romine*, 98 Ind. 77, 81; *Dowell v. State*, 83 Ind. 357; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Vogt v. Ticknor*, 48 N. H. 242; *Spencer v. Dearth*, 43 Vt. 98; *Goodnow v. Smith*, 97 Mass. 69; *Kip v. Brigham*, 7 Johns. (N. Y.) 168; *Key v. Dent*, 14 Md. 86; *Ray v. Clemens*, 6 Leigh (Va.) 600; *State v. Foster*, 3 McCord (S. Car.) 442; *Fox v. Fox*, 4 La. Ann. 135; *Lee v. Lee*, 21 Mo. 531; *Smith v. Chapin*, 31 Conn. 530; *Taylor v. Means*, 73 Ala. 468; *McCamant v. Robbins*, 66 Tex. 260. But see post § 1536, fraud in procuring or altering domestic judgments.

<sup>30</sup> *Stephen Ev. art. 40.*

<sup>31</sup> *Reed v. Jackson*, 1 East 357; *Berry v. Banner, Peake*, 156; *Brisco v. Lomax*, 8 Adol. & El. 198; *Evans v. Rees*, 10 Adol. & El. 151; *Rex v. St. Pancras, Peake* 220; *Rex v. Haughton*, 1 El. & B. 501; *Fowler v. Savage*, 3 Conn. 90; *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *People v. Halladay*, 102 Cal. 661, 36 Pac. 927, *City of London v. Clerke, Carth.* 181; *Vaughan v. Phebe*, 1

shown, judgments in actions in rem, in so far at least as they fix the status of the particular subject matter, may not only be admissible, but may also be conclusive in a proper case, even against strangers to the record.<sup>32</sup>

**§ 1526. Warrantors and others notified to defend.**—A judgment where one has warranted the title to real estate and has been vouched or notified to appear and defend an action of ejectment brought against his grantee or the like, is generally conclusive as to the matters thereby determined and may be shown in evidence in a proper case for that purpose in an action by the grantee against such warrantor.<sup>33</sup> A similar rule has also been applied in the case of other indemnitors, sureties or guarantors,<sup>34</sup> and also in cases in which an action is brought against a municipal corporation for personal injuries on account of negligence in regard to obstructions in streets where the party primarily liable had been notified to appear and defend, and the municipal corporation having had judgment rendered against it seeks its remedy over against such party primarily liable. In accordance with this doctrine, although making a somewhat novel application of it, it has recently been held by the Supreme Court of Indiana that where one who received an injury by stepping into a dangerous excavation made by an in-

Mart. & Y. (Tenn.) 1, 17 Am. Dec. 770; Mulholland v. Killen, 1 R. 9 Eq. 471.

<sup>32</sup>See post § 1530; also, Gelston v. Hoyt, 13 Johns. (N. Y.) 561, 3 Wheat. (U. S.) 246; Risley v. Phenix Bank, 83 N. Y. 318, 332, 38 Am. R. 421; McKinney v. Collins, 88 N. Y. 216; People v. Baker, 76 N. Y. 78, 32 Am. R. 274; Pennoyer v. Neff, 95 U. S. 714; Dorset v. Manchester, 3 Vt. 370; Gibson v. Nicholson, 2 Serg. & R. (Pa.) 422; Noel v. Wells, 1 Lev. 235; Allen v. Dundas, 3 Term 125; Bouchier v. Taylor, 4 Brown P. C. 708; Prosser v. Wagner, 1 C. B. N. S. 289.

<sup>33</sup>Morgan v. Muldoon, 82 Ind. 347; Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565, and note; McConnell v. Downs, 48 Ill. 271; Hamilton v. Cutts, 4 Mass. 349, 3 Am.

Dec. 222; Chamberlain v. Preble, 11 Allen (Mass.) 370; Cooper v. Watson, 10 Wend. (N. Y.) 202; Davis v. Wilbourne, 1 Hill (S. Car.) 27, 26 Am. Dec. 154; Paul v. Witman, 3 Watts & S. (Pa.) 407; Knapp v. Marlboro, 34 Vt. 235; Daskam v. Ullman, 74 Wis. 474, 43 N. W. 321; Marsh v. Smith, 73 Iowa, 295, 34 N. W. 866.

<sup>34</sup>South Bend, &c. Co. v. Fidelity, &c. Co. (Ind. App.), 67 N. E. 269, 68 N. E. 688; Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. 399; Lewis v. Knox, 2 Bibb (Ky.) 453; Copp v. McDugall, 9 Mass. 1; Cox v. Thomas, 9 Gratt. (Va.) 323; Lee v. Clark, 1 Hill (N. Y.) 56. See, also, First Nat. Bank v. First Nat. Bank, 68 Ohio St. 43, 67 N. E. 91.

dependant contractor brought suit against the contractor for the injuries sustained, and this resulted in a judgment for the defendant, such judgment could be used in bar of an action by such person against the city for such injuries.<sup>35</sup>

**§ 1527. Principal and surety—Bonds.**—There is much conflict among the authorities as to the admissibility and effect of a judgment against a principal when offered in an action against his surety. The present tendency, however, seems to be to hold such judgments to be at least *prima facie* evidence against the surety,<sup>36</sup> and they are sometimes held to be conclusive.<sup>37</sup> So, in actions against sureties on the bonds of executors and administrators such evidence is generally admissible, and the weight of authority is perhaps to the effect that at least where the bond contains some condition the legal effect of which is that the surety shall be bound by any judgment against the principal, such judgment is conclusive against the surety.<sup>38</sup> But there are many cases in which a judgment against the

<sup>35</sup> *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443. See, also, for the application of the same principle as against persons primarily liable on an action over against them by the municipality, and in other similar cases, *Boston v. Worthington*, 10 Gray (Mass.) 496; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; *Portland v. Richardson*, 54 Me. 46; *City of Rochester v. Montgomery*, 72 N. Y. 65; *City of St. Joseph v. Union R. Co.* 116 Mo. 636, 38 Am. St. 626; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Green v. New River Co.* 4 Term 590, and authorities cited in *City of Anderson v. Fleming*, *supra*, and in *Elliott Roads & Streets* (2d ed.) § 870. See, also, as to judgment against one joint tortfeasor, *Blackman v. Simpson*, 120 Mich. 377, 58 L. R. A. 410, and note. As to judgment against an employe being a bar to judgment against the master, see *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, and elaborate note.

<sup>36</sup> *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. 682; *McLaughlin v. Bank of the Potomac*, 7 How. (U. S.) 220; *Drummond v. Prestman*, 12 Wheat. (U. S.) 515; *Berger v. Williams*, 4 McLean (U. S.) 577; *Haddock v. Perham*, 70 Ga. 572; *Curry v. Mack*, 90 Ill. 606; *Spencer v. Dearth*, 43 Vt. 98; *City of Lowell v. Parker*, 10 Met. (Mass.) 309; *Jacobs v. Hill*, 2 Leigh (Va.) 393; *Jaynes v. Platt*, 47 Ohio St. 262; *Bone v. Torrey*, 16 Ark. 83. See, also, notes in 33 Am. R. 802; 83 Am. Dec. 380; 52 L. R. A. 165.

<sup>37</sup> *McLaughlin v. Bank of the Potomac*, 7 How. (U. S.) 220; *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780; *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206.

<sup>38</sup> *Stovall v. Banks*, 10 Wall. (U. S.) 583; *Street v. Henry*, 124 Ala. 153, 27 So. 411; *Martin v. Tally*, 72 Ala. 23; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Willey v. Paulk*, 6 Conn. 74; *Salter v. State*, 5 Ind. 202; *State v. Slanier*, 80 Ind. 397; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604, by statute; *Housh*



executor or administrator has been held to be only *prima facie* evidence.<sup>39</sup> A similar conflict exists in regard to judgments against principals on bonds of sheriffs or other officers. In some cases it is held that such a judgment is only admissible against the surety to show the fact of its rendition.<sup>40</sup> In other cases it has been held admissible as *prima facie* evidence,<sup>41</sup> and in still other cases it has been held that the judgment against the principal is conclusive against the sureties as to the default or misconduct of the principal and the amount of damages.<sup>42</sup>

**§ 1528. Judgment must be final and on merits.**—A judgment

*v. People*, 66 Ill. 178; *Hobbs v. Middleton*, 1 J. J. Marsh. (Ky.) 176; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; *Meyer v. Barth*, 97 Wis. 352, 72 N. W. 748; *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273; *Taylor v. Hunt*, 34 Mo. 205; *Baggott v. Boulger*, 2 Duer (N. Y.) 160; *Casoni v. Jerome*, 58 N. Y. 315; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041; *Garber v. Commonwealth*, 7 Pa. St. 265; *Boyd v. Caldwell*, 4 Rich. L. (S. Car.) 117; and numerous authorities cited in note in 52 L. R. A. 187, 188.

<sup>39</sup> *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905; *Bennett v. Graham*, 71 Ga. 211; *Fontleroy v. Lyle*, 5 T. B. Mon. (Ky.) 266; *Verret v. Belanger*, 6 La. Ann. 109; *Iglehart v. State*, 2 Gill & J. (Md.) 235; *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651; *Hobson v. Yancey*, 2 Gratt. (Va.) 73; *Seat v. Cannon*, 1 Humph. (Tenn.) 471; *Smith v. Smithson*, 48 Ark. 261, 3 S. W. 49; and authorities cited in note in 52 L. R. A. 187.

<sup>40</sup> *Lucas v. Governor*, 6 Ala. 826; *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647; *Carmichael v. Governor*, 4 Miss. 236; *Rodini v. Lytle*, 17 Mont. 448, 52 L. R. A. 165, and note.

<sup>41</sup> *Stephens v. Shafer*, 48 Wis. 54, 33 Am. R. 793, and note; *State v.*

*Jennings*, 14 Ohio St. 73; *State v. Cason*, 11 S. Car. 392; *Taylor v. Johnson*, 17 Ga. 521; *Graves v. Bulkley*, 25 Kans. 249, 37 Am. R. 249; *Mullen v. Scott*, 9 La. Ann. 173; *Heath v. Shrempp*, 22 La. Ann. 167; *Hussey v. Marty*, 61 Minn. 430, 63 N. W. 1090; *Munford v. Overseers*, 2 Rand. (Va.) 313; *Aiken v. Bailey*, 9 Yerg. (Tenn.) 111. See note, 41 Am. Dec. 683; *Westervelt v. Smith*, 2 Duer (N. Y.) 449; *Stephens v. Shafer*, 48 Wis. 54, 33 Am. R. 793, and note.

<sup>42</sup> *Tracey v. Goodwin*, 5 Allen (Mass.) 409; *State v. Colerick*, 3 Ohio, 487; *McBroom v. Governor*, 4 Port. (Ala.) 90; *Dane v. Gilmore*, 51 Me. 544; *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206; *Masser v. Strickland*, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668; *Evans v. Commonwealth*, 8 Watts (Pa.), 398; 34 Am. Dec. 477; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690; *Crawford v. Turk*, 24 Gratt. (Va.) 176.

In a recent case a judgment against a sheriff for wrongful seizure of property on execution was also held conclusive against those who executed the indemnity bond. *Woodworth v. Gorsline*, 30 Colo. 186, 58 L. R. A. 417.

does not have the conclusive effect of a former adjudication unless it is a final judgment.<sup>43</sup> To have such effect it must also be upon the merits.<sup>44</sup> The cases in which a judgment will not be conclusive in a second action because not upon the merits, have been classified as follows: "(1) Where the plaintiff fails for the want of jurisdiction in the court to hear his complaint or grant him relief; (2) where he has misconceived his action; (3) where he has not brought the proper parties before the court; (4) where the decision was on demurrer and the complaint in the second suit sets forth the cause of action in proper form; (5) where the first suit was prematurely brought; (6) where the matter in the first suit was ruled out as inadmissible under the pleading."<sup>45</sup>

A final judgment upon demurrer is considered as a judgment upon the merits, and becomes *res judicata* as to the matters necessarily determined just as any other final judgment.<sup>46</sup> But a demurrer may be based on each of several different grounds, and it is sometimes difficult to tell on what ground the court decided. The authorities are conflicting as to the presumption in such a

<sup>43</sup> *Agnew v. Omaha Nat. Bank*, (Neb.), 96 N. W. 189; *Reed v. Proprietors*, 8 How. (U. S.) 274; *Allen v. Blunt*, 3 Story (U. S.) 746; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Estate of Holbert*, 57 Cal. 257; *Collins v. Carr*, 116 Ga. 39, 42 S. E. 373; *Wadsworth v. Connell*, 104 Ill. 369; *Ridgely v. Spencer*, 2 Bin. (Pa.) 70; *Child v. Morgan*, 51 Minn. 116; *Humphreys v. Browne*, 19 La. Ann. 158; *Saylor v. Hicks*, 36 Pa. St. 392; *Dunlap v. Robinson*, 12 Ohio St. 530; *Pearson v. Post*, 2 Dak. 220. See notes, 37 Am. St. 29-32, 96 Am. Dec. 775-788.

<sup>44</sup> *Liddell v. Chidester*, 84 Ala. 508, 4 So. 426, 427, quoting *Freeman Judg.* § 256, 5 Am. St. 387; *Gray v. Daugherty*, 25 Cal. 266; *Louisiana State Bank v. Orleans Nav. Co.* 3 La. Ann. 294; *Schindel v. Suman*, 13 Md. 310; *Morton v. Sweetser*, 12 Allen (Mass.) 134; *Gerish v. Pratt*, 6 Minn. 53; *Bell v. Hoagland*, 15 Mo. 360; *Mosby v.*

*Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Brackett v. Hoitt*, 20 N. H. 257; *Carmony v. Hooper*, 5 Pa. St. 305; *Weathered v. Mays*, 4 Tex. 387; *Webb v. Buckelew*, 82 N. Y. 555; *Agnew v. McElroy*, 10 Sm. & M. (Miss.) 552, 555, 48 Am. Dec. 772; *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. 470; *Walsh v. Walsh* (Neb.), 95 N. W. 1025.

<sup>45</sup> *Freeman Judg.* § 263.

<sup>46</sup> *Willoughby v. Stephens*, 132 N. Car. 254, 43 S. E. 636; *Ellis v. Northern Pac. R. Co.* 80 Wis. 459, 27 Am. St. 44, 144 U. S. 458; *McLaughlin v. Doane*, 40 Kans. 392, 10 Am. St. 210; *Bissell v. Spring Valley*, 124 U. S. 225, 8 Sup. Ct. 495; *Freeman Judg.*, § 267. But not, it has been held, to an action on a new promise where the demurrer in the first action was sustained on the ground that it was barred by the statute of limitations. *Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 672.

case, and as to the effect of the adjudication, just as they are where there is a decision upon one or more of several issues. These questions are discussed and the authorities reviewed in a note to a recent case in which it is held that uncertainty as to what was decided is fatal to the use of the judgment as an estoppel.<sup>47</sup>

§ 1529. **Matters in issue—Extrinsic evidence.**—It is agreed by most authorities that mere collateral facts, although controverted and used in evidence, are not necessarily conclusively determined, yet that every point which had been either expressly or by necessary implication in issue, and which must necessarily have been decided in order to support the judgment or decree, is concluded. As said by Mr. Freeman: "A judgment is conclusive upon every matter actually and necessarily decided in a former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must now be taken as conclusively settled."<sup>48</sup> Nor is it necessary that the form and object of the two actions should be the same.<sup>49</sup>

<sup>47</sup> *Fahey v. Esterley Machine Co.* 3 N. Dak. 220, 44 Am. St. 554, 564-570. See, also, *Dennison, &c. Co. v. Scharf, &c. Co.* 121 Fed. 313, as to the extent to which the judgment on demurrer is an adjudication.

<sup>48</sup> 1 Freeman Judg. § 256. See, also, *Maynard v. Newton*, 116 Ga. 195, 42 S. E. 376; *Henderson v. Hall*, 134 Ala. 455, 32 So. 840.

<sup>49</sup> *State v. Wheeler* (Mo. App.), 74 S. W. 497; *Moore v. Williams*, 132 Ill. 589, 24 N. E. 617; *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Owens v. Raleigh*, 6 Bush (Ky.) 656; *Bell v. McColloch*, 31 Ohio St. 397; *Sewell v. Scott*, 35 La. Ann. 553; *Leib v. Lichtenstein*, 121 Ind. 483, 23 N. E. 284; *Day v. Valette*, 25 Ind. 42, 87 Am. Dec. 353; *Harryman v. Roberts*, 52 Md. 64; *Hatch v. Coddington*, 32 Minn. 92; *Mitchell v. Chisholm*, 57 Minn. 148, 58 N. W. 874; *Gilbert v. Boak Fish Co.* 86 Minn. 365, 58 L. R.

A. 735; *Edwards v. Baker*, 99 N. Car. 258; *Schrörers v. Fish*, 10 Colo. 599; *Sanderson v. Peabody*, 58 N. H. 116; *Murphy v. DeFrance*, 101 Mo. 151; *Eastman v. Cooper*, 15 Pick. (Mass.) 285, 26 Am. Dec. 600; *Lawrence v. Vernon*, 3 Sum. (U. S.) 20; *Ferrer's Case*, 6 Coke, 7; *Bond v. Carter* (Tev. Civ. App.), 73 S. W. 45; *Perry v. Lewis*, 49 Miss. 443; *Agnew v. McElroy*, 18 Miss. 552, 48 Am. Dec. 772; *Goodenow v. Litchfield*, 59 Iowa, 226; *McNeely v. Hyde*, 46 La. Ann. 1083; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *Ahl v. Goodhart*, 161 Pa. St. 455; *Spear v. Tidball*, 40 Neb. 107; *Attorney General v. Chicago R. Co.* 112 Ill. 520; *Hitchin v. Campbell*, 2 W. Bl. 778, 827. See note, 96 Am. Dec. 787.

As to whether injury to both person and property by the same act constitutes one cause of action and as to the question of former adjudication in such cases, see *Reilly v. Sicilian Asphalt Pav. Co.* 170 N. Y.

It sometimes happens that it is impossible to determine from the record alone just what issues were involved or litigated or decided in the former action, and whether the issues in the two actions are the same. Parol evidence is not admissible to contradict the record in the former suit,<sup>50</sup> but it may be admissible where there is uncertainty in the record as to whether the precise question was raised and determined, and the general rule has been stated as follows: "Whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury and were necessarily passed on by them."<sup>51</sup> But, it is said in one case, "the rule never has extended to the introduction of evidence, showing the action taken by the jury, or what matters were considered by them,"<sup>52</sup> and it is well settled that the jurors themselves cannot be examined and testify as to such matters involving their secret deliberations.<sup>53</sup>

40, 62 N. E. 772, 57 L. R. A. 176, and *King v. Chicago, &c. R. Co.* (Minn.), 50 L. R. A. 161, and note

<sup>50</sup> *Fromlet v. Poor*, 3 Ind. App. 425, 29 N. E. 1081; *Bentley v. Brown*, 123 Ind. 552, 24 N. E. 507; *Armstrong v. St. Louis*, 69 Mo. 309; *Gray v. Dougherty*, 25 Cal. 266; *Equitable Trust Co. v. Smith*, 77 Fed. 677; *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. 444.

<sup>51</sup> *Miles v. Caldwell*, 2 Wall. (U. S.) 43. To same effect that parol evidence is admissible, see *Fahey v. Esterley Machine Co.* 3 N. Dak. 220, 55 N. W. 580, 44 Am. St. 554, and elaborate note, also considering the subject of the burden of proof of such matter; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, 94 U. S. 608; *Jepson v. International Alliance*, 17 R. I. 471; *Cook v. Burnley*, 45 Tex. 97; *Gray v. Dougherty*, 25 Cal. 266; *Leopold v. City of Chicago*, 150 Ill. 568; *Humpfner v. Osborne Co.* 2 S. Dak. 310;

*Post v. Smilie*, 48 Vt. 185; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *Wright v. Salisbury*, 46 Mo. 26; *Long v. Baugas*, 2 Ired. L. (N. Car.) 290, 38 Am. Dec. 694; *McTighe v. McLane*, 93 Ala. 626; *Embden v. Lisherness*, 89 Me. 578, 36 Atl. 1101, 56 Am. St. 442; *Emery v. Fowler*, 39 Me. 326; *Munro v. Meech*, 94 Mich. 596, 63 Am. Dec. 627; *White v. Chase*, 128 Mass. 158; *Appeal of Buckingham*, 60 Conn. 143; *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. 444; *Indianapolis, &c. R. Co. v. Clark*, 21 Ind. 150; *Reast v. Donald*, 84 Tex. 648; *Warwick v. Underwood*, 3 Head (Tenn.) 238, 75 Am. Dec. 767; *Crum v. Boss*, 48 Iowa, 433; *King v. Chase*, 15 N. H. 9; *Supples v. Cannon*, 44 Conn. 424; notes in 96 Am. Dec. 786 and 56 Am. St. 442.

<sup>52</sup> *Crum v. Boss*, 48 Iowa, 433.

<sup>53</sup> *Wood v. Jackson*, 8 Wend. (N. Y.) 23, 22 Am. Dec. 611; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 81, 25 Am. Dec. 538; *Packet Co. v. Sickles*,

§ 1530. **Judgments in rem.**—Judgments in rem which affect the status of a particular subject matter, unlike judgments in personam, may be conclusive evidence against third persons as well as against the actual parties thereto. All who claim adverse rights in the subject matter are bound to come in and assert them, and if they fail to do so they will be conclusively bound by the judgment.<sup>54</sup> But, where constructive notice only is given, the proceedings in rem cannot, as a general rule, be made the foundation of other proceedings in personam so as to conclude third persons upon the facts involved.<sup>55</sup> Judgments in attachment and garnishment proceedings are in a sense judgments in rem, but they are more properly classified as judgments quasi in rem, and the judgment in such proceedings is generally conclusive only as between the parties.<sup>56</sup> An interesting question is presented by statutes in some states providing for constructive notice as to unknown owners, unknown heirs, and the like, in actions to settle the title to property, treating the proceeding as one in rem, but it is not within the scope of this work to treat such matters.<sup>57</sup>

§ 1531. **Judgments in divorce cases.**—In so far as a judgment of

5 Wall. (U. S.) 580, 593. But testimony of an attorney has been received. *Susquehanna Ins. Co. v. Mardorf*, 152 Pa. St. 22, 25 Atl. 234.

<sup>54</sup> *The James G. Swan*, 106 Fed. 94; *Gelston v. Hoyt*, 13 Johns. (N. Y.) 561; 3 Wheat. (U. S.) 246; *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. R. 421; *Croudson v. Leonard*, 4 Cranch (U. S.) 434; *The Helena*, 4 C. Rob. 3; *Williams v. Armroyd*, 7 Cranch (U. S.) 423; 2 Smith L. C. 851; *Scott v. Shearman*, 2 W. Bl. 982; *Castrique v. Imrie*, L. R. 4 H. L. 414. See, also, *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319.

<sup>55</sup> *Salem v. Eastern R. Co.* 98 Mass. 448, 96 Am. Dec. 650; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6; *Pennoyer v. Neff*, 95 U. S. 714. Nor are they always a bar to a personal proceeding or vice versa. *Toby v. Brown*, 11 Ark. 308; *The Odorilla*,

128 Pa. St. 283, 18 Atl. 511. See, also, *De la Montanya v. De la Montanya*, 112 Cal. 101, 53 Am. St. 165 and note; *Farrell v. St. Paul*, 62 Minn. 271, 54 Am. St. 641.

<sup>56</sup> *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165. See, also, *Fairbanks v. Kent* (Colo. App.), 63 Pac. 707; *Jones v. Spencer*, 15 Wis. 583; *Kemper-Thomas Paper Co. v. Shyer*, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173; *Lorch v. Aultman*, 75 Ind. 162; *Roose v. McDonald*, 23 Ind. 157; *Samuel v. Agnew*, 80 Ill. 553; *Texarkana, &c. R. Co. v. Gray* (Tex. Civ. App.), 65 S. W. 85.

<sup>57</sup> See, however, notes in 1 Am. St. 264-266; 87 Am. St. 368; 31 Am. St. 80; 60 Am. St. 756; 24 Am. St. 212; 20 Am. St. 547; *Tyler v. Judges*, 175 Mass. 71, 179 U. S. 405; *People v. Simon*, 176 Ill. 175; *Hamilton v. Brown*, 161 U. S. 256.

divorce fixes the status of the parties, it is a judgment in rem,<sup>58</sup> but in so far as it disposes of other matters such as alimony or dower, especially if on constructive service alone, it is not conclusive on third persons as to such matters,<sup>59</sup> nor as to the fact of marriage or the fact of guilty conduct.<sup>60</sup> As between the parties, however, the usual rules as to the conclusiveness of a judgment generally prevail.<sup>61</sup>

§ 1532. **Probate proceedings.**—The decree of a probate court in the settlement of an estate which is in the nature of a judgment or decree in rem is binding on all the world.<sup>62</sup> The letters of adminis-

<sup>58</sup> *Hull v. Hull*, 2 Strob. Eq. (S. Car.) 174; *Hubbell v. Hubbell*, 3 Wis. 662, 62 Am. Dec. 702; *Mansfield v. McIntyre*, 10 Ohio, 28; *Ditson v. Ditson*, 4 R. I. 87; *Thompson v. State*, 28 Ala. 12; *Tolen v. Tolen*, 1 Blackf. (Ind.) 407, 21 Am. Dec. 742; *Estate of Newman*, 75 Cal. 213, 7 Am. St. 146; *Gould v. Crow*, 57 Mo. 200. See, also, *Wilson v. Elliott* (Tex.), 73 S. W. 946; *Freeman Judg.* § 584; *Black Judg.* § 803; note in 83 Am. St. 617. But see *People v. Baker*, 76 N. Y. 78, 32 Am. R. 274; *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. 447; *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193.

<sup>59</sup> *Cook v. Cook*, 56 Wis. 195, 43 Am. R. 706; *Wright v. Wright*, 24 Mich. 180; *Mansfield v. McIntyre*, 10 Ohio, 28; *Webster v. Webster*, 54 Iowa, 153; *Bush v. Herring*, 113 Iowa, 158, 84 N. W. 1036; *Beard v. Beard*, 21 Ind. 321; *Turner v. Turner*, 44 Ala. 437; *Gould v. Crow*, 57 Mo. 200; *Prosser v. Warner*, 47 Vt. 667, 19 Am. R. 132; *Reel v. Elder*, 62 Pa. St. 308; *Garner v. Garner*, 56 Md. 127.

<sup>60</sup> *Gourand v. Gourand*, 3 Redf. (N. Y.) 262; *Gill v. Reed*, 5 R. I. 343, 73 Am. Dec. 73; *Needham v. Bremner*, L. R. 1 C. P. 583, 12 Jur. N. S. 434.

<sup>61</sup> *Fera v. Fera*, 98 Mass. 155;

*Thurston v. Thurston*, 99 Mass. 39; *Slade v. Slade*, 58 Me. 157; *Vance v. Vance*, 17 Me. 203; *McFarlane v. Cornelius* (Colo.), 73 Pac. 325; *Brown v. Brown*, 37 N. H. 536, 75 Am. Dec. 154; *Prescott v. Fisher*, 22 Ill. 390; *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Blain v. Blain*, 45 Vt. 538; *Amory v. Amory*, 26 Wis. 152. See note, 65 Am. Dec. 361; *Van Fleet Former Adj.* 712, et seq. But see as to judgments of other states, *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237.

<sup>62</sup> *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369; *Caujolle v. Ferrie*, 13 Wall. (U. S.) 465; *Rudy v. Ulrich*, 69 Pa. St. 177, 8 Am. R. 238; *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631; *Moonney v. Hines*, 160 Mass. 469, 36 N. E. 484; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Gates v. Treat*, 17 Conn. 388; *Sanborn v. Perry*, 86 Wis. 361; *Hutton v. Williams*, 60 Ala. 107; *Winslow v. Donnelly*, 119 Ind. 565, 22 N. E. 12; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. R. 276; *Jones v. Chase*, 55 N. H. 234; *Roderigas v. East River Sav. Inst.* 63 N. Y. 460, 20 Am. R. 555; *Cecil v. Cecil*, 19 Md. 79, 81 Am. Dec. 626; *Wall v. Wall*, 123 Pa. St. 545, 10 Am.

tration or those issued to an executor are evidence that the person to whom they are issued is the administrator or executor and has the authority incident to that office, and that the preliminary proceedings have been properly taken.<sup>63</sup> And in actions in regard to the settlement of the estate they are conclusive of the right of the administrator or executor to maintain actions to collect claims due the estate;<sup>64</sup> but they are not conclusive proof of the death of the alleged decedent even between parties and privies.<sup>65</sup> Nor, of course, are the judgments of such court exempt from direct attack. If the appointment of the executor or administrator for the probate of a will is secured by fraud or collusion, these facts may generally be proved in a direct proceeding in the same court attacking the judgment.<sup>66</sup> So, if letters are granted upon the estate of a person who is alive, they are null and void.<sup>67</sup>

**§ 1533. Showing want of jurisdiction.**—The subject of the presumptions in favor of the jurisdiction of courts has elsewhere been treated. If the want of jurisdiction appears on the face of the

St. 549; *Corrigan v. Jones*, 14 Colo. 311; *Lawrence v. Englesby*, 24 Vt. 42; *Blake v. Butler*, 10 R. I. 133; *Turner v. Malone*, 24 S. Car. 398; *Kurtz v. St. Paul, &c. R. Co. (Minn.)*, 63 N. W. 1. See notes, 75 Am. Dec. 722; 46 Am. St. 466; 21 L. R. A. 680-689. But it is held that an executor's settlement binds only the parties thereto, in *Butterfield v. Smith*, 101 U. S. 570.

<sup>63</sup> *Mutual L. Ins. Co. v. Tisdale*, 91 U. S. 238; *Allen v. Dundas*, 3 Term 125; 1 Starkie Ev. 374 m. See, also, *Barclift v. Treece*, 77 Ala. 528.

<sup>64</sup> *Mutual L. Ins. Co. v. Tisdale*, 91 U. S. 238, citing 2 Smith Lead. Cas. 669; *Vanderpoel v. Valkenburgh*, 69 N. Y. 190. See, also, *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342; *Phelen v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614. But see *Goodman v. Winter*, 64 Ala. 410, 38 Am. R. 13; *Johnes v. Jackson*, 67 Conn. 89, 34 Atl. 709.

<sup>65</sup> *Thompson v. Donaldson*, 3 Esp. 63; *Moons v. De Bernales*, 1 Russ.

301; *Cunningham v. Smith*, 70 Pa. St. 450; *Tisdale v. Connecticut M. L. Ins. Co.* 26 Iowa, 170, 96 Am. Dec. 136; *English v. Murray*, 13 Tex. 366; See note, 19 Am. R. 148. But they have been held conclusive in a collateral proceeding: *French v. Frazier*, 7 J. J. Marsh. (Ky.) 425; *Lancaster v. Insurance Co.* 62 Mo. 121; or where no plea in abatement is filed. *Newman v. Jenkins*, 10 Pick. 515. See, also, *Mutual L. Ins. Co. v. Tisdale*, 91 U. S. 238, as to when not conclusive as against others.

<sup>66</sup> See *Waters v. Stickney*, 12 Allen (Mass.) 1; *Estate of Leavens*, 65 Wis. 440.

<sup>67</sup> *Melia v. Simmons*, 45 Wis. 334, 30 Am. R. 746, and note; *Jochumsen v. Savings Bank*, 3 Allen (Mass.) 87; *Morgan v. Dodge*, 44 N. H. 529; *Griffith v. Frazier*, 8 Cranch (U. S.) 9; *Duncan v. Stewart*, 25 Ala. 408; *Thomas v. People*, 107 Ill. 517, 47 Am. R. 458; *Roderigas v. East River Sav. Inst.* 76 N. Y. 316, 32 Am. R. 309.

proceedings, the judgment may generally be collaterally attacked;<sup>68</sup> but according to the weight of authority and the better reason, if it does not so appear the judgment of a domestic court of general jurisdiction cannot be collaterally attacked by extrinsic evidence of want of jurisdiction.<sup>69</sup> There are, however, authorities to the contrary.<sup>70</sup> In regard to inferior courts we have elsewhere expressed our views as to what ought to be the rule, but the weight of authority, perhaps, sustains the following propositions: The recital of jurisdictional facts in the proceedings of such courts is *prima facie* evidence of their existence, but there is no conclusive presumption of their truth, and they may be contradicted by extrinsic evidence,<sup>71</sup> at least where the court is one of another state. So the jurisdiction of inferior courts should appear on the face of the proceedings, and it has frequently been held that if it does not so appear the judgment is void.<sup>72</sup>

<sup>68</sup> *Venner v. Denver, &c. Co.* 15 Colo. App. 495, 63 Pac. 1061; *McKee v. McKee*, 14 Pa. St. 231; *Jackson v. Brown*, 3 Johns. (N. Y.) 459; *Tunis v. Withrow*, 10 Iowa, 305, 77 Am. Dec. 117; *Hess v. Cole*, 23 N. J. L. 116; *Babbitt v. Doe*, 4 Ind. 355; *Moore v. Starks*, 1 Ohio St. 369; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Ragan's Estate*, 7 Watts (Pa.) 438; *Harris v. Hardeman*, 14 How. (U. S.) 334. See, also, 40 Cent. Law Jour. and notes in 26 Am. R. 27; 11 Am. R. 435.

<sup>69</sup> *Gulickson v. Bodkin* (Minn.), 80 N. W. 783; *Pease v. Whitten*, 31 Me. 117; *Succession of Durnford*, 1 La. Ann. 92; *Parks v. Moore*, 13 Vt. 183, 37 Am. Dec. 589; *Grier v. McLendon*, 7 Ga. 362; *Selin v. Snyder*, 7 Serg. & R. (Pa.) 171; *Barron v. Fart*, 18 Ala. 668; *Clark v. Sawyer*, 48 Cal. 133; *Brockerborough v. Melton*, 55 Tex. 493; *Wenner v. Thornton*, 98 Ill. 156; *Cook v. Darling*, 18 Pick. (Mass.) 393; *Wingate v. Haywood*, 40 N. H. 437; *Clark v. Bryan*, 16 Md. 171; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. R. 589; *Letney v. Marshall*, 79 Tex. 573; *Callen v. Ellison*, 13 Ohio St.

446, 82 Am. Dec. 448; *Coit v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73; *Freeman* Judg. § 130.

<sup>70</sup> See *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. R. 589, and authorities cited. See especially, *Williamson v. Berry*, 8 How. (U. S.) 495; *Galpin v. Page*, 18 Wall. (U. S.) 350; and for limitations of the rule against collateral attack, see *Windsor v. McVeigh*, 93 U. S. 274; *United States v. Walker*, 109 U. S. 258.

<sup>71</sup> *Jenks v. Stebbins*, 11 Johns. (N. Y.) 224; *Barber v. Winslow*, 12 Wend. (N. Y.) 102; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; *People v. Cassels*, 5 Hill (N. Y.) 164; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Willis v. Sproule*, 13 Kans. 257; *Sears v. Terry*, 26 Conn. 273; 1 Smith Lead. Cas. (8th ed.) 1120. But see Vol. I, §§ 100, 101.

<sup>72</sup> *King v. Bates*, 80 Mich. 367, 20 Am. St. 518, and note; *Adams v. Jeffries*, 12 Ohio, 253, 40 Am. Dec. 477; *Van Deusen v. Sweet*, 51 N. Y. 378; *Bigelow v. Stearns*, 19



§ 1534. **Foreign judgments.**—According to the more recent decisions, foreign judgments, even in actions in personam, are generally conclusive against parties and privies, and prevent any retrial on the merits.<sup>73</sup> In a New York case it is said: "We think the rule adopted in England holding the same doctrine as to foreign judgments and recognized in this state should be adopted and adhered to here in respect to such foreign judgments, and that the same principles and decisions which we have made as to judgments in the courts of the other states of the Union should be applied to foreign judgments."<sup>74</sup> But a foreign judgment may be impeached by extrinsic evidence showing want of jurisdiction,<sup>75</sup> and it is generally held that such a judgment does not involve a merger of the original cause of action.<sup>76</sup>

Johns. (N. Y.) 39, 10 Am. Dec. 189; Chase v. Hathaway, 14 Mass. 222; Enos v. Smith, 15 Miss. 85; Clark v. Bryan, 16 Md. 171; Jolley v. Foltz, 34 Cal. 321. But see Vol. I, §§ 100, 101.

<sup>73</sup> Brinckley v. Brinckley, 50 N. Y. 202; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Atlanta Co. v. Andrews, 120 N. Y. 58; Low v. Mussy, 41 Vt. 393; Silver Lake Bank v. Harding, 5 Ohio, 545; Coughran v. Gilman, 81 Iowa, 442; Chicago Bridge Co. v. Packing Co. 46 Fed. 584; Glass v. Blackwell, 48 Ark. 50; McDonald v. Grand Trunk R. Co. 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448; Wernse v. McPike, 100 Mo. 476; Memphis R. Co. v. Grayson, 88 Ala. 572; Hilton v. Guyott, 42 Fed. 249; Elasser v. Haines, 52 N. J. L. 10; Edwards v. Jones, 113 N. Car. 453; Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 32 L. R. A. 236; Griggs v. Beeker, 87 Wis. 313; McMullen v. Richie, 41 Fed. 502; Gioe v. Westervelt, 116 Fed. 1017; Ferguson v. Mahon, 11 Adol. & El. 179; Godard v. Gray, L. R. 6 Q. B. 139. But see Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 131. The presumption is in favor of jurisdiction and regularity, where

the court is a court of record and general jurisdiction, but not, it seems, where it is a court of inferior and limited jurisdiction. Vol. I, § 102.

<sup>74</sup> Lazier v. Westcott, 26 N. Y. 154, 82 Am. Dec. 411, and note.

<sup>75</sup> Bischoff v. Wethered, 9 Wall. (U. S.) 812; McEwan v. Zimmer, 38 Mich. 765, 31 Am. R. 332; Putnam v. McDougall, 47 Vt. 478; Wernet's Appeal, 91 Pa. St. 319; Donnitzger v. German Sav. & C. Asso. 23 Wash. 132, 62 Pac. 862; National Exch. Bank v. Wiley (Neb.), 92 N. W. 582; Eureka, & Co. v. California Ins. Co. 130 Cal. 153, 62 Pac. 393; Biswell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Middlesex Bank v. Butman, 29 Me. 19; Foster v. Glazener, 27 Ala. 391; Corby v. Wright, 4 Mo. App. 443; Bank v. Morse, 168 N. Y. 458, 56 L. R. A. 139; DeMeli v. DeMeli, 120 N. Y. 485, 17 Am. St. 652; Ferguson v. Mahon, 11 Adol. & El. 179; Reynolds v. Fenton, 3 C. B. 187; Schibsbys v. Westenholtz, L. R. 6 Q. B. 155; 2 Smith Lead. Cas. 847.

<sup>76</sup> Bank of Australasia v. Harding, 9 C. B. 661; Bank v. Beebe, 53 Vt. 177; New York, & C. R. Co. v. McHenry, 17 Fed. 414.

§ 1535. **Judgments of other states.**—In a decision by the Supreme Court of the United States it is said: "Cases may be found in which it is held that the judgments of a state court when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They are not foreign judgments under the Constitution and laws of Congress in any proper sense, because they shall have such faith and credit given to them in every other court within the United States as they have by law and usage in the courts of the state from whence they are taken. Nor are they domestic judgments in every sense, because they are not the proper foundation for final process except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments."<sup>77</sup> If the want of jurisdiction appears upon the face of the record itself, it is clear that the judgment can have no effect,<sup>78</sup> and it has even been held that evidence may be received to contradict the record as to jurisdictional facts.<sup>79</sup> But there are decisions, on the contrary, to

<sup>77</sup> *Christmas v. Russell*, 5 Wall. (U. S.) 305.

<sup>78</sup> *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Middlesex Bank v. Butman*, 29 Me. 19; *Tessier v. Lockwood*, 18 Neb. 167; *Bissell v. Wheelock*, 11 Cush. (Mass.) 277; *Rothrock v. Dwelling House Ins. Co.* 161 Mass. 423, 37 N. E. 206.

<sup>79</sup> *Downer v. Shaw*, 22 N. H. 277; *Baltzell v. Nosler*, 1 Iowa, 588, 63 Am. Dec. 466; *Carleton v. Bickford*, 13 Gray (Mass.) 591, 74 Am. Dec. 652; *Norwood v. Cobb*, 15 Tex. 500; *Jardine v. Reichert*, 39 N. J. L. 167; *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. R. 340; *Tremblay v. Aetna Life Ins. Co.* 97 Me. 547, 55 Atl. 509; *Thum v. Pike* (Idaho), 66 Pac. 157; *Thompson v. Whitman*, 18 Wall.

(U. S.) 457; *Harris v. Hardeman*, 14 How. (U. S.) 334; *Lawrence v. Jarvis*, 32 Ill. 304; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. R. 646; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *McDermott v. Clary*, 107 Mass. 501; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. R. 589; *Koonce v. Butler*, 84 N. Car. 221; *Easley v. McClinton*, 33 Tex. 288; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. R. 299; *Kane v. Cook*, 8 Cal. 449; *Marx v. Fore*, 51 Mo. 69, 11 Am. R. 432; *Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151; *Kingsbury v. Yniestra*, 59 Ala. 320; *People v. Dawell*, 25 Mich. 247, 12 Am.

the effect that recitals in the judgment of a court of another state as to jurisdictional facts cannot be contradicted.<sup>80</sup> However this may be, the usual presumption as to jurisdiction and regularity of proceedings of courts of general jurisdiction in accordance with the course of the common law, exists until overthrown.<sup>81</sup> Under the Constitution, the courts of the state where a judgment is offered have the right to inquire how far it would be conclusive in the state in which it was rendered, and the effect which it would have there is the effect which should be given to it in other states.<sup>82</sup> It would also seem that fraud in the cause of action which could have been pleaded as a defense would not be available, but that fraud in procuring a judgment, or, in other words, fraud upon the court might be shown according to the practice in some jurisdictions as a defense,<sup>83</sup> although it is the general rule that such a judgment like a domestic

R. 260; *Brown v. Eaton*, 98 Ind. 591. In *Boyle v. Meisser-Sauntry, &c. Co.* (Minn.), 93 N. W. 520, it is said that the constitutional provision applies only when the court has jurisdiction of the subject matter and of the parties.

<sup>80</sup> *Zepp v. Hager*, 70 Ill. 223; *Wetherill v. Stillman*, 65 Pa. St. 105; *Semple v. Glenn*, 91 Ala. 245; *Lapham v. Briggs*, 27 Vt. 26; *Caughran v. Gilman*, 72 Iowa, 570; *Wilson v. Jackson*, 10 Mo. 330; *Griggs v. Becker*, 87 Wis. 313; *Hall v. Mackay*, 78 Tex. 248.

<sup>81</sup> *Eltonhead v. Allen*, 119 Fed. 126, 55 C. C. A. 671; *National Bank v. Home Security Co.* 65 Kans. 642, 70 Pac. 646; *Hassell v. Hamilton*, 33 Ala. 280; *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428; *Glos v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Nunn v. Sturges*, 22 Ark. 389; *Scott v. Coleman*, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; *Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Buffum v. Stimson*, 5

*Allen* (Mass.) 591, 81 Am. Dec. 767; *Stewart v. Stewart*, 27 W. Va. 167; *Mink v. Shaffer*, 124 Pa. St. 280; *Talbot v. Roe*, 27 Mont. 480, 71 Pac. 672; *Freeman* Judg. § 565.

<sup>82</sup> *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 271; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466; *Cage v. Cassidy*, 23 How. (U. S.) 109; *Renaud v. Abbott*, 116 U. S. 227, 6 Sup. Ct. 1194; *McLaren v. Kahler*, 23 La. Ann. 80, 8 Am. R. 502, and note; *Sanborn v. Perry*, 86 Wis. 361; *Simmons v. Clark*, 56 Ill. 96; *French v. Pease*, 10 Kans. 51. See, also, *Union, &c. Bank v. City of Memphis*, 111 Fed. 561.

And it is held that in an action in a federal court sitting in another state the same effect will be given the judgment in a suit in a state court as would be given it by the courts of the state in which it was rendered. *Glencoe Granite Co. v. City Trust, &c. Co.* 118 Fed. 386.

<sup>83</sup> See *Coleman v. Howell*, 131 N. Car. 125, 42 S. E. 555; *Freeman* Judg. § 576.

judgment where jurisdiction exists must be attacked directly and not collaterally.<sup>84</sup>

**§ 1536. Fraud in procuring or altering domestic judgments.**—The weight of authority is to the effect that domestic judgments cannot be collaterally attacked by parties or privies by extrinsic evidence of fraud or collusion or alteration, when rendered by a court having competent jurisdiction.<sup>85</sup> So it is said by Judge Van Fleet, that “on principle it cannot be shown in a collateral action that a judgment entry has been forged or altered, for the very plain reason that the only legitimate evidence is a duly certified copy of the alleged entry, and anything that the officer in charge of the original will certify to is conclusive. No one but the officers in charge of the records of the court can lawfully have access to them. No other court can send its subpoena duces tecum for them, and no statute or rule of common law has ever so provided. Even where the collateral attack is in the same court it has no lawful right to have the original records brought before it for inspection, the only issue permitted being null and void record. When the original or a copy is read

<sup>84</sup> *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *Anderson v. Anderson*, 8 Ohio, 109; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240; *Granger v. Clark*, 22 Me. 128; *Sanford v. Sanford*, 28 Conn. 6; *McDonald v. Drew*, 64 N. H. 547.

<sup>85</sup> *Haven v. Owen*, 121 Mich. 51, 79 N. W. 938, 80 Am. St. 477, and note; *Simms v. Slacum*, 3 Cranch (U. S.) 300; *Smith v. Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; *Granger v. Clark*, 22 Me. 128; *In re Watson*, 30 Kans. 753, 1 Pac. 775; *Hennessey v. St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; *Lake County v. Platt*, 79 Fed. 567; *Carpentier v. Oakland*, 30 Cal. 439; *Smith v. Smith*, 22 Iowa, 516; *Ottersen v. Middleton*, 102 Pa. St. 78; *Davis v. Davis*, 61 Me. 395; *Krekeler v. Ritter*, 62 N. Y. 372; *Blanchard v. Webster*, 62 N. H. 467; *Ross v.*

*Wood*, 70 N. Y. 8; *Hawley v. Mancius*, 7 Johns. Ch. (N. Y.) 174; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Freeman* Judg. § 334. But see *Chapin v. Bowder*, 16 Cal. 408; *State v. Thistlewaite*, 83 Ind. 317; *Roderigas v. East River Sav. Inst.* 76 N. Y. 316, 32 Am. R. 309; 1 *Wharton Ev.* § 797; *Rogers v. Gwinn*, 21 Iowa, 58; *Mandeville v. Reynolds*, 68 N. Y. 528; *Stark's Appeal*, 128 Pa. St. 545. As to the proper remedy, see *Dugan v. McGann*, 60 Ga. 353; *Ogden v. Larrabee*, 57 Ill. 389; *Cowin v. Toole*, 31 Iowa, 513; *Hayden v. Hayden*, 46 Cal. 332; *Carrington v. Holabird*, 17 Conn. 530; *Hahn v. Hart*, 12 B. Mon. (Ky.) 426; *Binsse v. Barker*, 13 N. J. L. 263, 23 Am. Dec. 720; *Poindexter v. Waddy*, 6 Munf. (Va.) 418, 8 Am. Dec. 749; *Whittlesey v. Delaney*, 73 N. Y. 571; *Bresnehan v. Price*, 57 Mo. 422; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

to the court it must decide the issue on that. The issue that a record has been forged or altered can only be raised or tendered in a direct proceeding between the parties or their privies to cancel or correct it. In such a proceeding a court can both inspect the record and hear witnesses and decide the issue."<sup>86</sup> Mr. Freeman admits that the weight of authority is in accord with the reasoning above given, but is inclined himself to favor the contrary rule.<sup>87</sup> Strangers who would otherwise be prejudiced as to their rights are not prohibited from impeaching in judgment collaterally by showing that it was obtained by fraud and collusion.<sup>88</sup>

§ 1537. **Estoppel by verdict—Appeal—Non-suit.**—A verdict may be received in evidence to establish the mere fact that there was a trial and verdict.<sup>89</sup> But in civil cases a verdict without judgment will not constitute a bar to another action even as to the same subject matter and between the same parties.<sup>90</sup> In criminal cases, how-

<sup>86</sup> Van Fleet Collateral Attack § 549.

<sup>87</sup> See note in 80 Am. St. 479-484.

<sup>88</sup> *Rex v. Kingston* (Duchess of Kingston's Case), 20 How. St. Tr. 355; *Atkinsons v. Allen*, 12 Vt. 619, 36 Am. Dec. 361; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *De Armond v. Adams*, 25 Ind. 455; *Faris v. Dunham*, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 281; *Ogle v. Baker*, 137 Pa. St. 378, 21 Am. St. 886; *Second Nat. Bank's Appeal*, 85 Pa. St. 528; *Murcheson v. White*, 54 Tex. 78; *Downs v. Fuller*, 2 Met. (Mass.) 135, 35 Am. Dec. 393; *Smith v. Cuyler*, 78 Ga. 654; *Shallcross v. Beats*, 43 N. J. L. 177; *Greene v. Greene*, 2 Gray (Mass.) 365, 61 Am. Dec. 454.

<sup>89</sup> *Kipp v. Brigham*, 7 Johns. (N. Y.) 168; *Barlow v. Dupuy*, 1 Mart. N. S. (La.) 442; *Fisher v. Kitchingham*, Willes 367.

<sup>90</sup> *Saylor v. Hicks*, 36 Pa. St. 392; *State v. Norvell*, 2 Yerg. (Tenn.)

24, 24 Am. Dec. 458; *Schurmeier v. Johnson*, 10 Minn. 319; *Buller N. P.* 234; *Child v. Morgan*, 51 Minn. 116, 52 N. W. 1127; *Gurnea v. Seeley*, 66 Ill. 500; *Rudolph v. German Mut. F. Ins. Co.* 71 Ill. 190; *Petton v. Walter*, 1 Str. 162; *Butler v. Stephens*, Wals. (1 Miss.) 219; *McReady v. Rogers*, 1 Neb. 124; *Harris v. Gano*, 117 Ga. 934, 44 S. E. 11. But see *Hume v. Schintz*, 90 Tex. 72, 36 S. W. 429.

So, in *Van Fleet Former Adjudication*, 119, it is said: "No finding nor verdict will bar another suit until judgment is rendered upon it. The same is true in respect to a finding of facts with an order to enter a judgment or a verdict by a court of equity, so long as no judgment is actually entered. So, special findings of the jury, not confirmed by judgment nor involved in the general verdict, and matters specially found by them upon the evidence, not within the issues and upon which no judgment was rendered, are not exempt from future litigation. Likewise, a thing con-

ever, as no person shall twice be put in jeopardy for the same offense, the defendant is allowed to plead and prove a former valid verdict of acquittal or conviction, upon a subsequent prosecution for the same offense, although no judgment was rendered thereon by the court. A judgment of non-suit is not a judgment upon the merits, and cannot be pleaded and proved as *res adjudicata* in another suit between the same parties upon the same cause of action.<sup>91</sup> This is the general rule and is well settled by the overwhelming weight of authority, although a contrary view is taken in a recent case.<sup>92</sup> So, where a judgment has been reversed on appeal and the case sent back for a new trial, and subsequently on such new trial there is a non-suit, this is not such a final judgment on the merits as will create an estoppel by verdict and bar another action.<sup>93</sup> It is perhaps, however, an open question as to whether a mere appeal from a judgment prevents its use as evidence to establish a defense of *res adjudicata* in the finding or verdict, but

not included in, nor confirmed by the judgment, is not *res judicata*. So, if the jury, in answer to special questions, find certain material issues for the plaintiff, and the court renders a judgment for the defendant for costs notwithstanding the verdict, those findings are not *res judicata*, because they have never been sanctioned by the court." Citing on the last four propositions *Hawks v. Truesdale*, 99 Mass. 557; *Lorillard v. Clyde*, 99 N. Y. 196, 1 N. E. 614; *Auld v. Smith*, 23 Kans. 65, 69; *Whitney v. Bayer*, 101 Mich. 151, 59 N. W. 414.

<sup>91</sup> *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99; *Horner v. Brown*, 16 How. (U. S.) 354; *Gardner v. Michigan, &c. R. Co.* 150 U. S. 349, 14 Sup. Ct. 140; *Louisville, &c. R. Co. v. Wylie*, 1 Ind. App. 136; *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Dunham v. Carson*, 37 S. Car. 269; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Hendrick v. Clonts*, 91 Ga. 196; *Smith v. Floyd Co.* 85 Ga. 420; *Holland v. Hatch*,

15 Ohio St. 464; *Loeb v. Willis*, 100 N. Y. 231; *Hayes v. Collins*, 114 Mass. 54; *Bridge v. Sumner*, 1 Pick. (Mass.) 371; *Bishop v. McGillis*, 82 Wis. 120; *People v. Vilas*, 36 N. Y., 459, 93 Am. Dec. 520; *Bauden v. Roliff*, 1 Mart. N. S. (La.) 165, 14 Am. Dec. 181; *Holmes v. Chicago, &c. R. Co.* 94 Ill. 439; *Mills v. Pettigrew*, 45 Kans. 573; *Gates v. McLean*, 70 Cal. 42. See note, 96 Am. Dec. 778, and note in 49 Am. St. 831.

<sup>92</sup> *Cartin v. South Bound R. Co.* 43 S. Car. 221, 20 S. E. 979, 49 Am. St. 829. See, also, *Brett v. Marston*, 45 Me. 401; *McNamara v. Home Land, &c. Co.* 121 Fed. 797; *Board of Com'rs of Lake County v. Schradsky*, 31 Colo. 178, 71 Pac. 1104.

<sup>93</sup> *Gardner v. Michigan Cent. R. Co.* 150 U. S. 349, 14 Sup. Ct. 140; *Illinois Cent. R. Co. v. Benz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. 763; *Spring Valley Coal Co. v. Patting*, 207 Ill. 226, 69 N. E. 925, 59 Cent. Law Jour. 210, and note. See, also, *Foley v. Cudahy* (Iowa), 93 N. W. 284.

cata;<sup>94</sup> and where there is a judgment on dismissal by agreement<sup>95</sup> or a judgment on confession it will generally constitute a bar.<sup>96</sup>

§ 1538. **Estoppel by deed.**—An estoppel by deed is said to arise or be created in certain instances, and it was a common law rule that no man should be allowed to dispute his own solemn deed;<sup>97</sup> but an estoppel by deed strictly operates only as to parties and privies.<sup>98</sup> And parties are usually affected thereby only in the character in which they executed the deed.<sup>99</sup> As a general rule, an invalid deed,

<sup>94</sup> Holding that it does, see *Texas R. Co. v. Jackson*, 85 Tex. 605; *Murray v. Green*, 64 Cal. 363; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. 23, and note. That it does not, see *Smith v. Schreiner*, 86 Wis. 19; *Parkhurst v. Burdell*, 110 N. Y. 386; *Board of Com'rs of Lake County v. Schradsky*, 31 Colo. 178, 71 Pac. 1104; *Burton v. Burton*, 28 Ind. 342; *Faber v. Hovey*, 117 Mass. 107; *Willard v. Ostrander*, 51 Kans. 481; *Freeman* Judg. § 328. See, also, note, 37 Am. St. 29.

In a recent case it was held that a reversal on appeal on the ground that the complaint did not state a cause of action reversed the judgment of the trial court as an entirety, so that no portion thereof could be used as *res adjudicata*. *Mattingly v. Lewisohn*, 13 Mont. 508, 35 Pac. 111. See, also, *Empire, &c. Co. v. Bunker Hill, &c. Co.* 122 Fed. 973.

<sup>95</sup> *Van Valkenburgh v. Milwaukee*, 13 Wis. 574; *Merritt v. Campbell*, 47 Cal. 542; *Bank of Commonwealth v. Hopkins*, 2 Dana (Ky.) 395; *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; *Phillipotts v. Blasdell*, 10 Nev. 19; *Hoover v. Mitchell*, 25 Gratt. (Va.) 387.

<sup>96</sup> *Neusbaum v. Keim*, 24 N. Y. 325; *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Fletcher v. Holmes*, 25 Ind. 458; *Dunn v. Pipes*,

20 La. Ann. 276. And it has been held that a dismissal which is not made "without prejudice" may be a bar to a future action. *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482; *Stults v. Forst*, 135 Ind. 297, 34 N. E. 1125.

<sup>97</sup> *Goodtitle v. Bailey*, 2 Cowp. 597; *De Frieze v. Quint*, 94 Cal. 653, 30 Pac. 1, 28 Am. St. 151; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Comstock v. Smith*, 13 Pick. (Mass.) 120, 23 Am. Dec. 670. See, also, *Layson v. Cooper*, 174 Mo. 211, 73 S. W. 472; *Scobey v. Kinningsham*, 131 Ind. 552, 31 N. E. 355; *Myers v. Snyder*, 96 Iowa, 107, 64 N. W. 771, holding a mortgagor estopped from denying title to the mortgaged property.

<sup>98</sup> *Bates v. Norcross*, 17 Pick. (Mass.) 14; *Thomason v. City of Dayton*, 40 Ohio St. 63.

But recitals may be admissible in favor of a stranger against a party to a deed as simple admissions. *Franklin v. Dorlan*, 28 Cal. 175, 87 Am. Dec. 111.

<sup>99</sup> *Wright v. De Groff*, 14 Mich. 164; *Trentman v. Eldridge*, 98 Ind. 525; *Smith v. Penny*, 44 Cal. 161; *Kellerman v. Miller*, 5 Pa. Super. Ct. 443; *Hall v. Matthews*, 68 Ga. 490; *Carothers v. Alexander*, 74 Tex. 328. But this depends largely on the covenants and language of the deed, and persons executing

or at least one which is absolutely void, does not work an estoppel,<sup>100</sup> nor does a valid deed ordinarily create an estoppel as to collateral matters.<sup>101</sup> So, although an estoppel might otherwise arise from some particular statement in a deed, if from the whole instrument or some other relevant instrument of equal dignity the truth appears, or an estoppel is created against an estoppel, the particular statement or estoppel that otherwise might arise may be rendered ineffective.<sup>102</sup> So, while particular and definite recitals are usually conclusive evidence as between parties and privies of the material facts stated,<sup>103</sup> mere general and indefinite recitals do not ordinarily estop the parties from disputing the statements therein made,<sup>104</sup> and the acknowledgment of the receipt of the consideration in a conveyance is not conclusive between the parties.<sup>105</sup> But parties to a deed bounding land on a street are generally estopped from denying

deeds in a representative capacity have sometimes been held estopped as individuals. *Prouty v. Maltser*, 49 Vt. 425; *Morris v. Wheat*, 8 D. C. App. 379; *Heard v. Hall*, 16 Pick. (Mass.) 457; *Hitchcock v. Southern Iron, &c. Co. (Tenn.)*, 38 S. W. 588.

<sup>100</sup> *Mason v. Mason*, 140 Mass. 63; *Merriam v. Boston, &c. R. Co.* 117 Mass. 241; *Slattery v. Hilperin (La.)*, 34 So. 139; *Gordon v. San Diego*, 101 Cal. 522. 36 Pac. 18, 40 Am. St. 73; *James v. Wilder*, 25 Minn. 305; *Shevlin v. Whelen*, 41 Wis. 88; *Collins v. Benbury*, 3 Ired. L. (25 N. Car.) 285, 38 Am. Dec. 722; *Fairtitle v. Gilbert*, 2 Term 169; *Doe d. Chandler v. Ford*, 3 Ad. & E. 649. But a deed invalid as to some grantors may work an estoppel as to others. *Chapman v. Abrahams*, 61 Ala. 108. See, also, *Daniels v. Tearney*, 102 U. S. 415.

<sup>101</sup> *Bank of America v. Banks*, 101 U. S. 240; *Norris v. Norton*, 1 Ark. 319; *Carpenter v. Buller*, 8 M. & W. 209.

<sup>102</sup> *Harmon v. Christopher*, 34 N. J. Eq. 459; *Branson v. Wirth*, 17 Wall. (U. S.) 32; *Hoboken v. Penn-*

*sylvania R. Co.* 124 U. S. 656, 693, 8 Sup. Ct. 643; *Brown v. Staples*, 28 Me. 497; *Kimball v. Schoff*, 40 N. H. 190. "An estoppel against an estoppel setteth the matter at large." *Coke Litt.* 325 b. See, also, *Boynton v. Haggart*, 120 Fed. 819, 57 C. C. A. 301.

<sup>103</sup> *Kennedy v. Brown*, 61 Ala. 296; *Usina v. Wilder*, 58 Ga. 178; *Johnson v. Thompson*, 129 Mass. 398; *Smith v. Graham*, 34 Mich. 302; *Redwood County v. Tower*, 28 Minn. 45; *Parkinson v. Sherman*, 74 N. Y. 88; *School Dist. v. Stone*, 106 U. S. 183; *Bowman v. Taylor*, 8 Adol. & El. 278.

<sup>104</sup> *Miller v. Moses*, 56 Me. 128; *Farrar v. Cooper*, 34 Me. 394; *Muhlenberg v. Druckenmiller*, 103 Pa. St. 631; *Kepp v. Wiggett*, 10 C. B. 35; *Right v. Bucknell*, 2 B. & Ad. 278.

<sup>105</sup> *Mobile, &c. R. v. Wilkinson*, 72 Ala. 286; *Coles v. Soulsby*, 21 Cal. 47; *Barter v. Greenleaf*, 65 Me. 406; *McCrea v. Purmot*, 16 Wend. (N. Y.) 460; *Shephard v. Little*, 14 Johns. (N. Y.) 210. But see *Dobbins v. Cruger*, 108 Ill. 188.



the existence of the street in an action concerning the boundary;<sup>106</sup> and it has been held that where one purchases lots described by reference to a plat, the plat is so far incorporated in the contract that the purchaser takes an easement in streets shown by such plat to have been dedicated by the grantor, and bordering on such lots, which the grantor is estopped to deny.<sup>107</sup>

§ 1539. **Miscellaneous.**—In many instances documents have only the effect of *prima facie* evidence, and in some instances, as in the case of mere receipts and the like, even when executed by a party, they may be contradicted by parol evidence. So in some instances they may not be so effective with the jury as a witness testifying in person. But, as shown in the chapters on parol evidence and on best and secondary evidence, as well as in other chapters directly relating to documentary evidence, they are usually of a higher nature or degree than parol evidence. So in many other instances, as well as in those already mentioned in this chapter, they have conclusive weight and effect. Thus, as elsewhere shown, legislative and certain other public records are sometimes conclusive as to matters properly shown therein, and so, too, in some instances, at least as between the parties, are private writings not only of such a character as deeds, but of various other kinds as well. And documents, especially when they come as real evidence, or when they were executed at a time when the person making them had no self-interest to serve, are often more effective with the jury as instruments of evidence, than ordinary witnesses.

<sup>106</sup> Bell v. Todd, 51 Mich. 21; Parker v. Smith, 17 Mass. 413; Bartlett v. Bangor, 67 Me. 460; Donohoo v. Murray, 62 Wis. 100, 22 N. W. 167.

See Elliott Roads & Streets (2d ed.) §§ 114, 117, 120.

<sup>107</sup> Cleaver v. Mahanke, 120 Iowa, 77, 94 N. W. 279, citing Elliott Roads & Streets (2d ed.) § 117.

## CHAPTER LXXIV.

### PRACTICAL SUGGESTIONS.

Sec.	Sec.
1540. Introductory.	1558. Cross-examination — Witnesses that exaggerate.
1541. Precautionary steps.	1559. Cross-examination — Showing witness unworthy of belief.
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1548. Examination-in-chief — Generally.	1566. Re-examination.
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§ 1540. **Introductory.**—In concluding this volume a few “practical suggestions” as to the procurement, preparation and use of instru-

ments of evidence would seem to be relevant and proper. It may be said by some that they are too elementary or self-evident, or that, being largely matters of opinion and advice based upon experience rather than authority, they are out of place and add nothing to the value of a work on evidence not intended solely for the law student or "young practitioner." But, on the other hand, in a book intended for all classes of lawyers, both young and old, such suggestions, based in some instances on authority as well as experience, do not seem to be out of place and may be of considerable value. Even an old and experienced advocate may sometimes have his memory refreshed as to some matter of policy or practice, and, indeed, a matter may be suggested to him that never occurred to him before. Such practical matters are not readily found, and, indeed, are seldom treated to any great extent, or, at least, in any one place in modern text-books, and yet one of the most valuable features of some of the English text-books on evidence, such, for instance, as Best on Evidence, is the treatment of just such matters.

**§ 1541. Precautionary steps.**—There are many precautionary steps that may have to be taken either for the purpose of establishing a complete cause of action or defense, or of obtaining proper evidence to establish it, or both. Thus a demand or a tender may be necessary; and notices of various kinds may have to be given or prepared and served. So there are cases in which notice should be given to a warrantor, indemnitor or other person against whom there is a remedy over, to appear and defend, in order that the judgment may conclude such person as to the matters thereby determined when the warranty or remedy over is sought to be enforced by one held liable as defendant in the action to which such notice refers.<sup>1</sup>

Again, the best evidence should be obtained, if practicable, and, if it is not procured, preparation must be made to lay the foundation for the admission of secondary evidence. All these, and other matters of a similar nature must usually be attended to before the trial, and some of them, indeed, must be attended to before an action is instituted.

<sup>1</sup> See *Morgan v. Muldoon*, 82 Ind. 347; *Brown v. Taylor*, 13 Vt. 631; *Jackson v. Marsh*, 5 Wend. (N. Y.) 44; *Sisk v. Woodruff*, 15 Ill. 15; *St. Joseph v. Union R. Co.* 116 Mo. 636, 38 Am. St. 626; *City of Ander-*

*son v. Fleming*, 160 Ind. 597, 202, 203, 67 N. E. 443, citing *Elliott Roads & Streets* (2d ed.) § 870, and numerous authorities applying particularly to municipal corporation cases.

§ 1542. **Interviewing witnesses.**—In an article in a recent number of the Central Law Journal, the following advice is given: "Next in importance to consulting the client is interviewing the witnesses. To best accomplish this the attorney must know something of them before they are approached. Is their attitude in the case hostile or friendly to your side? Are they under any strong inducement to conceal facts or to distort and color them? Are they to be relied on implicitly or must we verify and corroborate all their statements? Are they liable to be tampered with by the adversary, or are they proof against all corrupt influence? What has been their moral history? These, among other facts, should be considered before the witness is approached, to the end that you may secure from him the most and the best proof he is capable of giving. What the manner of that approach will be must depend upon the character of the witness. If he is thoroughly reliable you may explain with some degree of fullness what your position is, but never to such an extent that, if he proves false, he can damage your case by betraying your plan of action to the enemy. . . . If it is evident that a particular person knows more than he will tell, and keeps silent in the hope that he may escape the ordeal of testifying, it will be necessary to argue the matter with him in a spirit of friendliness, and seek to overcome his fears or his prejudices by legitimate appeals to his interest and his sense of right and justice. You may secure the cooperation of an acquaintance to induce him to divulge what he knows. If all expedients fail, and you are confident he will not disclose the facts, it will generally be safest not to summon him as a witness, for his stubborn silence upon the witness stand will detract from your side of the controversy. On the other hand, you may find your witnesses suspiciously talkative; they know too much. You will therefore proceed with them as with your client, sifting their knowledge, cross-examining them as your antagonist will probably do at the trial. . . . Especially the attorney will seek to discover what are the sources of the witnesses' knowledge, whether it is derived from hearsay reports of third parties, or from personal observation, and if they are stating what they actually saw or did, or merely their conclusions and opinions founded upon the facts perceived."<sup>2</sup>

§ 1543. **Inspection and production of documents.**—It is well said in the same article from which we have already quoted, that "where your evidence consists of documents, it is of prime importance that

<sup>2</sup> 55 Cent. Law Jour. 225.

you see the document itself and not trust to another's recollection of its contents. Your personal inspection may reveal erasures and alterations which must be explained, fatal ambiguities or ruinous clauses and conditions. It will greatly assist you in mastering the facts to visit the place in which occurred the accident, crime or transaction in question."<sup>3</sup> Important documents in the hands of the other party should generally be inspected, and the proper steps taken in due time to obtain such inspection in the manner pointed out in another chapter. So if the production of a document is desired at the trial, due notice should be given and the proper steps taken as elsewhere shown, or, if it will obtain what is desired, a subpoena duces tecum should be served in due time.

**§ 1544. Interrogatories to party—Examination before trial.**—It is frequently advisable to obtain discovery by filing interrogatories to the opposite party, where the statute provides therefor; but an examination of the adverse party before trial under the statutory provision in force in many states, in much the same manner as depositions of ordinary witnesses are taken, is sometimes preferable. In answering interrogatories the party has time to prepare and consult with his attorney or counsel as to every answer, as to just what bearing it may have on his case, and as to how it may be made or explained so as to do him the least harm. By taking his examination in the other mode he is deprived, to a great extent at least, of this advantage.

**§ 1545. Depositions—Taking and using.**—If the personal attendance of witnesses cannot be enforced by the process of the court, depositions must be taken, and notices to take them must be prepared and served as the law requires. The advocate should see to it that the proper method of examination is pursued in taking the testimony of the absent witnesses, and he cannot safely intrust the examination to a strange and uninstructed counsel. Indeed, it is difficult to prepare questions in advance or to fully instruct counsel, and, if practicable, counsel who have charge of the case should attend the taking of depositions. It is often necessary to examine in advance depositions taken by the adverse party, for the purpose of ascertaining whether there are valid objections to them, and it is always prudent

<sup>3</sup> 55 Cent. L. Jour. 225. See, also, of the importance of examining 1 Elliott's Gen. Pr. §§ 15, 16, 17, and documents, and of not relying on notes, where illustrations are given copies.

to examine them for the purpose of gaining information of the adversary's line of action. If there is reason to fear that the testimony of a witness may be lost, his deposition, *de bene esse*, should be promptly secured. The testimony of a witness present in court, all other things being equal, usually makes a stronger impression than does evidence in the form of a deposition. It is only where the attendance of an important witness cannot possibly be secured that his deposition should be substituted for his oral testimony. Testimony in the form of a deposition is competent in a proper case, and it would probably be error to instruct, as matter of law, that such testimony is of less weight than that delivered from the witness stand by the witness himself; but, nevertheless, testimony in the form of a deposition will not, as a rule, go so deep in the mind, nor remain so firmly fixed.<sup>4</sup> Another reason why depositions should not be used when the presence of the witness can be secured is that many things are brought to mind, as the contest warms the mental powers to increased activity, and are seen to be important, which were either not thought of, or the importance of which was not perceived, when preparing interrogatories in the quiet of the office. And if depositions are used they should be read with force and expression, and made as effective as possible.

§ 1546. **Subpoenas for witnesses.**—Directions to issue subpoenas for witnesses should be given in time to secure due service. For safety, subpoenas should be issued in every case, and counsel should not trust to the oral promises of witnesses that they will be in attendance. The means of compelling attendance should be provided by causing proper process to be served, and the tender of fees to be made in cases where it is required. Where documents or papers in the hands of a witness are needed, it is well to be sure that the subpoena properly describes them. It is also well to write in full the names and residences of witnesses. At the earliest practicable moment counsel should also ascertain what witnesses the adverse party will call, and obtain a knowledge of their business, their reputation and their character.

§ 1547. **Separation of witnesses.**—It is advisable, in some instances, to ask for a separation of witnesses, so that they may not

<sup>4</sup> *Carver v. Louthain*, 38 Ind. 530; *Millner v. Eglin*, 64 Ind. 197; *Starkie Ev.* (Sharswood's ed.) 767; 3

*Bacon Abridg.* 560; *Institute of Hindu Law*, ch. VIII.; *Ram Facts*, 38.

hear one another's testimony.<sup>5</sup> This is generally the better course to pursue where there is reason to suspect collusion and fabrication of testimony. But it should be borne in mind that if the court grants such a request the order will usually be made to apply to the witnesses of the party who makes the request, as well as to the witnesses of the other party.<sup>6</sup> So other considerations may render it inadvisable, unless there is good reason to believe that it will benefit the party who may ask for the separation.

**§ 1548. Examination-in-chief—Generally.**—As a general rule, a few introductory questions should be asked, both for the purpose of giving the witness confidence and for the purpose of giving him standing with the jury, and, after the introductory questions have been asked and answered, then directing the attention of the witness to the main fact upon which he is asked to testify, but not suggesting the answers, it is usually best to leave him, as far as practicable, to give his testimony in his own way. It is, however, advisable that the question which directs his attention to the principal matter should be so framed as to induce him to start in due order of time, and at the beginning, for if this be not done confusion will most likely result. Once the witness is started on the right course, the fewer the interruptions the better. It is a mistake, in most instances, to ply a witness with questions, since the process tends to confuse the witness, as well as to create distrust in the minds of the jurors, for they are not unlikely to regard it as a sort of pumping process to draw out matters not actually known to the witness, but created by him because he believes the advocate expects them from him. Mr. Chitty, in discussing the subject, says, speaking of the witness: "It is difficult, therefore, to extract the important parts of the evidence piecemeal, but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to describe all the facts in due order of time."<sup>7</sup> This is substantially the opinion of other authors.<sup>8</sup> The examiner should generally know what his witnesses will testify to, and stop when he gets it, but when the witness is adverse or stupid a different manner and line of examination may be required.

<sup>5</sup> See ante § 794, et seq.

<sup>6</sup> See ante § 798.

<sup>7</sup> Chitty Gen. Practice, 894.

<sup>8</sup> 1 Starkie Ev. 151, n. 1; Harris

Hints on Advocacy, 31; Ram Facts, 330; 2 Best Ev. (Morgan's ed.) 1109, n.

**§ 1549. Examination-in-chief—Omitted facts.**—An omitted fact may often be called to the mind of the witness by asking him to specifically describe a particular part of the place where the transaction occurred, or to name the persons who were present, or the like, and supplementing the question by asking the witness what was said and done. As direct questions, suggestive of the answers desired, cannot, ordinarily, be asked as a matter of right, the attention of the witness must be directed in general terms to the persons and place. This may be done without violating the general rule forbidding leading questions, as it is not improper to direct attention in non-suggestive terms to a place, person, thing or subject.<sup>9</sup> As Lord Langdale said in one case:<sup>10</sup> "It is impossible to examine a witness without referring to or suggesting the subject on which he is to answer."

**§ 1550. Examination-in-chief—Dates.**—It sometimes perplexes a witness to ask him as to a date, and unless the examiner is quite sure that the date is fixed in memory, or it is indispensably necessary to get the date, it is much better to ask for the occurrence and not for the date. Where a date is required, it is often better to lead up to the question which asks for it by questions calling out occurrences that will bring the date to memory.<sup>11</sup> Asking directly and without prefatory questions for a date will set many witnesses off on a crooked and perplexing train of thought, for, if the witness is not a very cool and strong one, he will think he has forgotten a thing he ought to remember, or he will confuse himself by the effort to ascertain whether he does really remember the date or not. Time, in many cases, becomes a question of grave importance, yet men ordinarily measure and remember time with less precision than almost any other thing.<sup>12</sup>

**§ 1551. Examination-in-chief — Unfavorable answer.**—An unfavorable answer ought not to put an end to the examination, unless it be impossible to proceed without increasing the mischief, for an abrupt stop may lead to the conclusion that the discomfiture of counsel is utter and irretrievable. This conclusion may be avoided by

<sup>9</sup> 1 Best Ev. 641, n. 1, § 1075; Lincoln v. Wright, 4 Beavan, 166; DeHaven v. DeHaven, 77 Ind. 236; Harvey v. Osborn, 55 Ind. 535.

<sup>11</sup> See Davis v. Terrill, 63 Tex. 105; Harris v. Rosenberg, 43 Conn. 227, 231.

<sup>12</sup> Ram Facts, ch. VI, § 1; 2 Elliott's Gen. Pr. § 607.

<sup>10</sup> Lincoln v. Wright, 4 Beavan, 166.



calmly receiving the statement, and cleverly turning the course of the testimony in another direction without precipitately retreating. If nothing more can be done than to tone down and soften the statement, it is better to do that than to abruptly close the examination. But if the preparatory work has been thoroughly done, the advocate ought not, as a general thing, to be surprised by such a statement; still, as there is not always an opportunity to examine witnesses in advance of the trial, and as witnesses do not always state the facts fully, it is wise to be prepared for action in the event of a surprise.<sup>13</sup>

§ 1552. **Cross-examination—Assumption.**—The cross-examiner enters upon his work from a point almost opposite that at which the counsel by whom the examination-in-chief is conducted begins his work. The latter begins with the presumption that his witness knows the facts and will state them truthfully, and without error or mistake; the former generally starts upon the presumption that the adverse witness is untruthful, or is in error through mistake, prejudice or ignorance. But the cross-examiner is not to presume that in every case the witness who testifies against him does so corruptly. It is, however, necessary that in nearly every case the cross-examiner should feel the influence of the presumption that the witness is, at some material point, at fault, or is mistaken; for, unless there is something in the testimony of the witness, or in the other testimony or circumstances that justifies or supports this presumption, there should be no actual cross-examination, though there may be the pretense of one.<sup>14</sup>

§ 1553. **Cross-examination—Object and extent.**—"The object of a cross-examination," says Sergeant Ballantine, "is not to produce startling effects, but to elicit facts which will support the theory intended to be put forward." In a sense this is true, but some qualification is needed. In general, the great purpose of a cross-examination is to break down the evidence-in-chief by showing error or falsehood, or by showing evil motives, or by toning it down to the least degree of harmful influence. It is well agreed that, in general, the fewer questions the better. Lord Abinger's axiom, which Mr. Taylor says he was fond of repeating to his juniors was "Never drive out two tacks by trying to drive in a nail." An evil arising from many questions is that of enabling the witness to supply omissions which he may have made in his examination-in-chief. Omissions are

<sup>13</sup> 2 Elliott's Gen. Pr. § 610.

<sup>14</sup> 2 Elliott's Gen. Pr. § 621.

sometimes left by a cunning examiner-in-chief for the very purpose of having them supplied by the cross-examination, since they there appear with much greater force. So, too, a multitude of questions is quite likely to give the witness an opportunity to strongly impress the jury by repeating material statements. And another danger arising from many questions is that of drawing out new matter, and so permitting it to be emphasized and paraded on the re-examination. It may, therefore, be taken as the better practice, as a general rule, to ask few questions, at least in the following cases: Where there is danger of supplying an omission; where there is danger of the witness shuffling out of an inconsistency, and where there is danger of strengthening the statements by repetition. The rule, however, is a mere general one, and will always yield to the peculiar circumstances of the particular instances.

§ 1554. **Apparent cross-examination.**—Where there is danger of doing harm by examining on really important matters, and yet it is felt that there must be something like an examination, lest it be concluded by the jury that the testimony is confessedly too strong to be met, what may be called an apparent cross-examination is proper and expedient. Such an examination should keep away from the points of danger as much as possible, and yet it must not appear to be an idle or unmeaning procedure. Many questions may be asked, and the prudent course is to ask many questions upon matters where the answers do no harm. This course will do much to prevent the jury from inferring that the witness is so strong that the examiner dare not grapple with him, and it may be so conducted that, while yielding a substantial benefit in this respect, it will not be productive of injury in any other. Thus, where the testimony of the witness is decidedly against the cross-examiner, it is often better to challenge it by an apparent examination rather than to permit it to go unchallenged, even though it be felt that no great impression can be made upon it. Where, however, the testimony of the witness is as strong as it can be made, there is, it is obvious, not much risk in the most persistent actual examination, while there is some hope of benefit. But, even in such a case, it is necessary to be very careful not to cause strong statements to be repeated, unless it is quite certain that they can be successfully explained or contradicted. If, however, there is strong and convincing explanatory or contradictory evidence, the more often and the more strongly the

witness, within reasonable limits, can be induced to repeat his statements the better.<sup>15</sup>

§ 1555. **Cross-examination—Caution—When advisable.**—A cross-examination should be conducted with the greatest caution, and where no good can come of it none should be attempted.<sup>16</sup> But the question first to be decided is whether any cross-examination is advisable.<sup>17</sup> It is advisable, as has been shown, where it is necessary to prevent the inference that the testimony is so strong as to frighten off any attack, and it is also advisable where there is hope of exposing falsehood, showing mistake, or exhibiting ignorance or prejudice. So, too, it is expedient where there is reason to believe that general statements may be toned down, or adverse facts explained. Again, it is advisable where there is strong reason for believing, in a case where the testimony does no harm, that favorable statements may be elicited, although in such a case the advocate must be very sure, that favorable testimony can be obtained. If there is doubt, it should generally decide the advocate to refrain from any attempt at a cross-examination. If no harm is done he is well off, and it would be sheer folly to incur the hazard of cross-examination.<sup>18</sup>

<sup>15</sup> 2 Elliott's Gen. Pr. § 623.

<sup>16</sup> Harris Hints on Advocacy, ch. III; Ram Facts, 147; The Advocate, 395; 1 Forum, 202. "Of all the duties of a counsel," says Montagu Williams, "that of cross-examination is, in my opinion, the most difficult one in which to acquire proficiency. Few have excelled in it. It is a dangerous weapon, and the true art lies in knowing either where not to put any questions at all, or the exact moment when to stop putting them."—Reminiscences of Montagu Williams.

<sup>17</sup> Sergeant Ballantine declares that his most effective cross-examination was a silent one. (Sergeant Ballantine's Experiences, 106.) He also says: "The reckless asking of a number of questions on the chance of getting at something is too often the plan adopted by un-

skillful advocates; and noise is mistaken for energy."

<sup>18</sup> This seems to have been the rule upon which Rufus Choate acted in his treatment of women who were witnesses against his client. "Never cross-examine a woman," he said. "It is of no use. They cannot disintegrate the story they have once told; they cannot eliminate the part that is for you from that which is against you. They can neither combine, nor shade, nor qualify. They go for the whole thing, and the moment you begin to cross-examine one of them, instead of being bitten by a single rattlesnake, you are bitten by a whole barrelful. I never, except in a case absolutely desperate, dared to cross-examine a woman." 6 Green Bag, 53. See, also, Wellman Art of Cross-examination, 113, et seq.

Where the witness is a bold one, and there is reason to suspect him of lying, an actual cross-examination, conducted with energy and resolution, is usually expedient. But in such cases it is generally a mistake to go at once to the material parts of his testimony. In discussing this subject, Mr. Harris says: "You must, in other words, go to the surrounding circumstances."<sup>19</sup> Long before he wrote, however, it was said: "The most effectual method is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with a falsehood ready made."<sup>20</sup>

§ 1556. **Cross-examination—Perils to be avoided.**—One of the great perils of a cross-examination is that of bringing out some incidental circumstance that confirms or corroborates the testimony of the witness on his direct examination. A fact incidentally mentioned, although intrinsically of little weight, will very often strongly re-enforce the testimony of a witness. Many illustrations of the strengthening of the testimony of a witness by the mistake of a cross-examiner are given in the books.<sup>21</sup> A fact elicited on cross-examination often seems stronger than when brought out on the examination-in-chief, for it will appear, unless great care is taken, to be a part of the cross-examiner's own evidence. So a circumstance or subsidiary fact coming out on cross-examination seems undesigned, and undesigned testimony is generally stronger than that designedly and deliberately given.<sup>22</sup> The danger, however, is not very serious if care is taken to keep away from the important facts and among the minor ones until some fact is disclosed, or some statement made, which appears not to be true.

Another danger is that of bringing out something against the party represented by the cross-examiner that was not brought out or fully developed on the examination-in-chief. Shrewd examiners have sometimes refrained from going fully into a matter for the very purpose of having it brought out on cross-examination, although this would not, ordinarily, be safe if the cross-examiner knew his business. So, the mere repetition on cross-examination of matter testified to in chief and harmful to the cross-examining

<sup>19</sup> Harris Hints on Advocacy (8th ed.) 63.

<sup>20</sup> Alison's Pr. Cr. L. 257. See, also, *State v. Duncan*, 116 Mo. 288, 22 S. W. 699, and Bacon Essay on

"Cunning." But see Wellman Art of Cross-examination, 59.

<sup>21</sup> Proffatt Jury Trials, §§ 236, 238; Ram Facts, 148, 149; Harris Hints on Advocacy, ch. IV.

<sup>22</sup> Whately Rhetoric, 55.

party is a danger to be avoided, except where it is for the purpose already indicated.

§ 1557. **Cross-examination—Manner of conducting.**—In conducting an examination-in-chief, order is the rule; but in conducting the cross-examination of a witness believed to be lying, disorder should be the foundation of the method of procedure. On this subject no better advice can be given than that of Mr. Cox, who says: "Dislocate his train of ideas and you put him out; you disturb his memory of his lesson. Thus, begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part, the most remote from the subject of the previous question." Again, this author says: "When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions." This embodies the experience of the authors who have written upon this subject, and may be accepted as the correct general rule, although it is by no means without exceptions. It is seldom that the testimony of a witness is false in all its parts. In general, there is a blending of truth and falsehood. This is quite as harmful as a complete fabrication, and is generally more difficult to detect and expose.<sup>23</sup> Many witnesses will not scruple to create a false impression by an evasion who would hesitate to testify to a story positively false. David Paul Brown thus illustrates this phase of false testimony: "The question is asked, 'Were you at the corner of Sixth and Chestnut streets at six o'clock?' A frank witness would answer, perhaps, 'I was near there.' But a witness who had been there and was desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, 'No,' although he may have been within a stone's throw of the place, or at the very place within ten minutes of the time." Dr. McCosh gives these apt illustrations: "A person is charged with having struck another with a stick of wood, to the danger of his life, and he replies that he did not injure him with a stick, though he was conscious all the while that he did so with a bar of iron. Or some one is charged with having done a base act on a certain day in the forenoon, and he denies it because he did it after twelve o'clock."<sup>24</sup> Few things are more difficult to run down and bring to light than an evasion made for a corrupt purpose. If, however, a witness who gives an evasive answer be closely watched he will, in many

<sup>23</sup> Port Royal Logic, 282.

<sup>24</sup> McCosh Logic, 179.

cases, betray himself by a peculiarity of emphasis, or by a slight wincing. The evasion is a tender spot, and a slight touch often makes him flinch. The proper course, where there is reason to believe the witness is endeavoring to deceive by evasive answers, is to press him with questions until he is driven to the fact, and no way of escape left open. In dealing with such a witness, especially if he be a cunning one, the inexperienced advocate makes the mistake of giving up the chase too soon, or is led from it by some crafty artifice. This mistake should not be made, for once the examiner has undertaken to obtain a direct and full statement of a fact he must usually persist.<sup>25</sup>

§ 1558. **Cross-examination—Witnesses that exaggerate.**—The detection of a corrupt exaggeration is sometimes accomplished by leading the witness to repeat and enlarge his exaggerations, and then, by a quick, sharp turn, suggesting some comparison that will clearly exhibit to the witness himself the falsity of his statements. When this can be done, as has often happened in cases of estimates of time, speed, distance, values, amounts, and the like, the witness is very likely to go to pieces on all other questions. But it is not every case in which this course can be successfully pursued. When it cannot be pursued with success, then it is sometimes prudent to probe vigorously and relentlessly for the naked facts. If, however, the facts which are believed to be corruptly colored or exaggerated can be shown in their true light and colors, then the better course is to draw on the witness to enlarge and color as much as he will. For this purpose it is not bad policy to imitate, in some degree, Judge Porter's course with Guiteau, and assist the witness as much as possible in showing his supposed superiority. With such witnesses stratagem is justifiable, since it is truth that is sought. The witness who is not so much hardened as to be willing to swear to a lie outright, and yet is unscrupulous enough to convert truth into a lie, is a weak witness if once his vulnerable point is pierced. If he can be made to feel that he has been fully detected on one point, then it is not difficult to discomfit him on all points. For this reason it is sometimes politic to let him understand fully that his false statements have been detected and exposed, and thenceforward deal with him with no gentle hand.<sup>26</sup> But, in other cases, it is more important than inexperienced advocates are apt to suppose, not to permit the witness to know that the examiner has suc-

<sup>25</sup> 2 Elliott's Gen. Pr. § 631.

<sup>26</sup> 2 Elliott's Gen. Pr. § 632.

ceeded if detecting his falsehood. If he discovers anything in the examiner's face or tone, he will usually endeavor to correct, modify or explain; but if he sees nothing to excite suspicion, he will exhaust his cunning in endeavoring to anticipate and prepare for what is coming.

**§ 1559. Cross-examination—Showing witness unworthy of belief.**

—In many ways it may be shown that the testimony of a witness is unworthy of belief. It is not so much the purpose of a cross-examination to make it appear that even a false witness is guilty of perjury as it is to show that he is not trustworthy. If it can be shown that his testimony is unworthy of belief, all that is of real value has been accomplished. Indeed, it is only in very strong cases that it is prudent to so fasten the witness as to require the conclusion that a disregard of his testimony is an imputation of perjury. There are such cases, but in general it is better not to push the witness into such a situation, for jurors are reluctant to impute perjury to any witness. It may be shown that the witness is unworthy of belief because his testimony is intrinsically improbable. It has, indeed, been shown that witnesses have stated things as facts that were physically impossible, and when this is the result, of course the inference must be that they are guilty of perjury. This was done in the case of the witness who testified that a designated amount in silver coin was carried a long distance by a party to the action, and a calculation made by counsel showed that the load was greater than a man could carry. It has also been done in other cases.<sup>27</sup> But it will seldom happen that the facts testified to by the witness can be shown to be physically impossible. It may, however, be so improbable as to fall of its own weight.<sup>28</sup> Men have testified to seeing objects when, because of darkness, or of obstacles, or by reason of the position they occupied, it was improbable that they could see them, or that they did not see when they must have seen. So, too, they have testified that injuries or wounds were inflicted in a manner so clearly improbable as to make their story unworthy of belief. The cases cited furnish apt illustrations of both of these statements.<sup>29</sup>

<sup>27</sup> Best Ev. §§ 654, 655. See, also, *Hunter v. New York, &c. R. Co.* 116 N. Y. 615, 23 N. E. 9; *Dolfine v. Erie R. Co.* 178 N. Y. 1, 70 N. E. 68.

<sup>28</sup> *Elwood v. Western U. Co.* 45 N. Y. 549; *In re Leslie*, 119 Fed. 406.

<sup>29</sup> See authorities in notes 27 and 28, supra.

**§ 1560. Cross-examination.—Witness that remembers only part.**—Where a witness testifies to facts upon which he cannot be contradicted, and declares that he cannot remember as to matters upon which he can be contradicted, the better course usually is to make as prominent as possible the facts which he asserts that he does not remember. If from his own testimony it can be made to appear that he is positive and bold where there is no fear of contradiction, and seeks shelter under the plea of forgetfulness, a great point of advantage will be gained. Lord Brougham, in securing from the Italian witnesses the often repeated “*Non mi ricordo*,” did much for the cause of his royal client. A witness who is driven to say again and again, “I don’t recollect,” is not far from overthrow, even though in other things he may acquit himself with apparent credit, and even though it may not appear that he is no danger of contradiction on the things he professes to have forgotten,<sup>30</sup> unless, indeed, the things he professes not to recollect are such as, under the circumstances, he would not likely remember, or unless they are of such little importance as not to be likely to have made any impression on his mind.

**§ 1561. Cross-examination as to motive.**—The importance of ascertaining and showing the motives of a witness believed, with reason, to be improperly or corruptly influenced or biased by them, is so manifest that there is little need to do more than suggest it. Jurors are not likely to believe that a witness has fabricated his story, or has willfully evaded the truth, or has unduly exaggerated it, unless there appears to them to be some reason for his doing so.<sup>31</sup> It is generally well to show interest, bias or prejudice at the earliest point practicable in the cross-examination, and to make it as prominent as possible.<sup>32</sup> But it is not always easy to do so. In some instances it may be shown by showing the relations of the parties, or even by direct questions. But it is often necessary to approach the subject indirectly.

A witness moved by interest, bias, or prejudice, needs incessant watching, for, unless checked, he will aid the party with whom he is in sympathy or injure the party against whom he is biased. Even his inferences or opinions, which he is likely to express, sometimes do harm, for they are often taken by the jury as facts, and, mingling

<sup>30</sup> See *Gibbons v. Potter*, 3 Stew. (N. J. Eq.) 204.

<sup>32</sup> *Harris Hints on Advocacy*, 50-51; 2 *Elliott's Gen. Pr.* § 641.

<sup>31</sup> *Ram Facts*, 157-170.



with the other evidence in the case, give it a color that sometimes very much augments its strength. A witness whose bias or passions induce him to put forth his inferences and opinions as facts will acknowledge them to be such with reluctance; but a self-deceived and honest witness will readily admit his error when it is pointed out to him. In cross-examining a witness of the latter class, who has testified with fairness and candor, it is just as well, in most instances, to plainly show him his error, and ask its correction. With a witness of the former class a different course must be pursued. He must be made to state each specific fact, and not be permitted to explain or enlarge, nor allowed to give answers not strictly responsive to the questions propounded to him. When the facts are thus brought out in detail, then it may sometimes be well to put it at him with something of sternness if he has not stated opinions and inferences instead of facts. But where the inference follows closely and surely from the fact, it would generally be useless to attempt to exhibit the error in blending fact and inference.<sup>33</sup>

**§ 1562. Cross-examining for explanations.**—It is not safe, as a general rule, to ask an explanation on cross-examination. Mr. Harris says: "Another item I would venture to give is, not to cross-examine for explanations."<sup>34</sup> There may be cases, however, and there are cases, where an explanation is the very thing a witness cannot give. Thus, in a published case, a witness testified that a man was struck on the left side of the face while stooping and looking westward, and yet he also testified that the train which struck him came from the east, and that the injured man was on the south side of the track. In such a case it is manifest that an attempt at an explanation would entangle the witness in a difficulty from which he could not escape. Where, therefore, the witness has been brought to a point where no explanation is possible, and there fastened, it is prudent to call for an explanation. So, too, where a matter is complicated, a demand for an explanation may often reveal the falsity of the testimony. Where, however, the matter is one of which a cunning witness can give a plausible explanation, then none should be asked; but in argument it should be shown that no satisfactory explanation is possible.

<sup>33</sup> 2 Elliott's Gen. Pr. § 643.

<sup>34</sup> Harris Hints on Advocacy (8th ed.) 59.

**§ 1563. Cross-examination—Separating facts from inferences.**

Witnesses even in good faith sometimes mistake their own conclusions, derived from inferences, for the actual facts. Mr. John Stuart Mill points out this tendency to blend facts with inference, saying, among other things: "The difficulty of inducing witnesses to restrain within any moderate limits the intermixture of their inferences with the narrative of their perceptions is well known to experienced cross-examiners, and still more is this the case when ignorant persons attempt to describe any natural phenomenon. 'The simplest narrative,' says Dugald Stewart, 'of the most illiterate observer involves more or less of hypothesis; nay, in general, it will be found that in proportion to his ignorance the greater is the number of conjectural principles involved in his statements.'"<sup>35</sup> Thus, if a witness should testify that a train of cars ran off the track because the engineer was not at his post, it would be quite important to separate the facts from the inference. So, if the witness should testify that he saw the accused with a gun in his hand lying in wait on the roadside for the deceased, it might be very essential to detach the fact from the inferential conclusion. Many other examples will readily occur to every advocate.

**§ 1564. Cross-examination to discover error.**—There are three principal sources of possible error in testimony of a witness: in the perception, in the memory, and in the narration.

In ascertaining whether the error is in the perception it is necessary to know the ability of the witness to observe what he testifies he saw or heard, and his opportunities of perceiving what he asserts he did perceive. A man's experience, his hopes, desires and fears mingle in almost every perception that enters his mind. Men of different minds, see things with very different eyes. Very few transactions, indeed, are seen in all their parts by witnesses to be precisely alike. So, men who expect things to happen are often deceived by things very slightly resembling the things they expect.<sup>36</sup> It is, therefore, generally expedient to so cross-examine as to discover the mental condition of the witness at the time of the occurrence of which he speaks, whether he was at the place for a specific purpose, what he expected or what he desired, how he was engaged,

<sup>35</sup> Mill Logic, 546; Jevon Elements of Logic, 236; Ram Facts, 158, note; Bowen Logic, 430; Whately Logic Appendix, 45.

<sup>36</sup> Carpenter Mental Physiology, 283; Sully Illusions, 30.

what his attention was fixed upon, and for what reason it was so fixed. So, an investigation into the time, place and situation of the witness is of importance, for the reason, among others, that from these things it is to be determined whether or not he had an opportunity to accurately perceive what he asserts he did perceive. If it is resolved to make an actual cross-examination for the purpose of ascertaining whether the witness did have an opportunity to acquire the knowledge he professes to assert, then, as a general rule, the examination should be very close and searching, probing into details, and often dissecting them into minute parts. It is also manifest that, as a general thing, the object must not be disclosed to the witness, since very few persons are willing to acknowledge that they had no opportunity to observe what they affirm they did observe. For this reason, it is better to keep to the main point for a time, and to occasionally break from the line by turning to other topics.

Human memory is treacherous. Few things remain in it without receiving color from existing impressions or experiences, and from other remembered things. There are many recorded instances where men have asserted that they remembered events that it was impossible for them to have witnessed.<sup>37</sup> Where the witness is believed to be an honest one, and to have unintentionally suffered matters of past knowledge or of experience to become blended with the matter of which he testifies, the object of the cross-examiner should be to effect a separation. This can generally be best effected by a gradual series of questions, leading the witness to state facts from which it may be inferred that the confusion of past or imagined things with that which he professes to have seen or heard has led him into error. Sometimes a candid witness, free from bias of prejudice, can be induced to acknowledge his mistake, or to confess that he cannot separate one thing from another. A striking illustration of this is afforded by the case of the witnesses in a trial in Scotland, who were unable to separate what they had read in a newspaper from what they had heard from the parties.<sup>38</sup> It is seldom, however, that more can be done than bring the causes of error into view, so as to make them a subject for effective comment in the argument to the jury. In other cases important facts

<sup>37</sup> *Ram Facts*, 68; observations of Sir John Romilly in 16 Beav. 185 and 23 Beav. 70.

<sup>38</sup> *Ram Facts*, 61; *Cockburn Memoirs of His Time*, 335.

are forgotten. These forgotten facts may often be recovered by arousing a train of thought that calls up the things associated with it. A forgotten transaction has been recalled by the sight of a letter, a receipt or a deed. In cross-examining such a witness the principal object is to recall to his mind some event, occurrence or thing that will bring in its train the forgotten fact. If this cannot be accomplished, then it is expedient to strip the remembered facts of all support from associated things, and cause them to stand out as detached, dislocated facts, without connection or relation with supporting facts. This course will, at least, supply fair reason for insisting before the jury that the witness either does not remember what he testifies, or, if he does, that there are other things he must necessarily have forgotten. In cases where oral conversations are testified to, this course is especially expedient, for it is not often that a witness can give the beginning and ending of a conversation.

§ 1565. **Cross-examination—Mistakes in identity.**—The books contain many cases of mistakes in identifying persons or things.<sup>39</sup> There are cases where the peculiar marks are such as to make the identification easy and certain, and in such cases there should generally be no cross-examination at all, or, if there must be one, it should not give prominence to these marks. Where, however, there are no marks of a peculiar character, and there is reason, to believe the witness is mistaken, a rigid actual cross-examination is expedient. But such an examination must not lead to a repetition of the general identification. It should get at the preconceived belief of the witness, and draw from him, one at a time, his reasons for his present belief; but, in doing this, the questions must move quickly from one part of the subject to another, thus breaking the continuity of thought, and not allowing the witness time to frame an hypothesis which shall support, or seem to support, his belief. No fact must be called out that will give support to the belief, nor must there, as a rule, be any question calling upon the witness to declare the degree of positiveness with which he speaks. This is the better general rule, but it is not without exception, and one is where it clearly appears that the cross-examination has shaken the confidence of the witness in his belief.<sup>40</sup>

§ 1566. **Re-examination.**—Favorable facts in the shape of new

\* Ram Facts, 87, 400.

<sup>40</sup> 2 Elliott's Gen. Pr. § 648.

matter are very often developed on cross-examination, and good use of these may be made on re-examination.<sup>41</sup> In some cases, however, it may be unsafe to follow the cross-examiner into this new matter, since he may have left it unfinished for the very purpose of enticing the re-examiner into an uncomfortable situation.

As a general rule, it is not good policy to re-examine for the purpose of explaining unimportant discrepancies, although in some instances it may be well to do so where the jury may deem them important. There is sometimes real harm done by re-examination on such matters, for a witness is frequently bewildered by a discovery that there is some discrepancy deemed so important as to demand an explanation, and, as his confusion increases, he goes from bad to worse. So, too, a re-examination on such points magnifies their importance, and may give them greater weight than they would otherwise possess.

A mishap that not infrequently befalls an inexperienced or careless re-examiner is that of eliciting new matter on re-examination, and thus affording the opposing counsel an opportunity of re-cross-examining.<sup>42</sup> There is no absolute right to introduce new matter on a re-examination,<sup>43</sup> but the wary advocate will not always avail himself of the rule on this subject, preferring in some cases—not always, however—to let the new matter in, and claim the right to re-cross-examine. Care should, therefore, be taken by the re-examiner not to develop new matter if a re-cross-examination is likely, as it usually is, to do harm.

§ 1567. **Offers to prove.**—In stating offers to prove, counsel often get a matter before the jury in a stronger and more harmful form than if the facts were elicited from the witnesses. The effort to keep out the evidence arouses the attention of the jury, and they give heed to all that passes with interest, so that the offered evidence is almost sure to find a lodgment in their minds, notwithstanding the fact that they may be instructed to disregard the statements, and consider only the evidence delivered to them. Such statements and matters blend with the legitimate facts, and influence the minds of the jurors in spite of all that can be done. An impressive statement of an offer to prove is a very dangerous

<sup>41</sup> See ante § 935. See, also, *Martin's Admr. v. Richmond, &c. R. Co.* 101 Va. 406, 44 S. E. 695; *Rob-*

*inson v. Manhattan R. Co.* 175 N. Y. 219, 67 N. E. 431.

<sup>42</sup> See ante § 939.

<sup>43</sup> See ante § 931.

thing. It is, therefore, sometimes a serious question whether it is better to object or let the evidence go in without objection, unless the court will require the offer to be made out of the hearing of the jury. If, however, the evidence is upon a turning point in the case it is generally better to keep it out. If adverse counsel attempt to speak of the rejected offer, there should be a prompt and determined interposition, and an instruction should also be asked advising the jury as to their duty, and indirectly rebuking counsel for advertg to matters which the jury have no right to consider.

**§ 1568. Incompetent evidence should be kept from jury—Objections.**—Incompetent evidence that may do harm should not reach the ears of the jurors if “skill of fence” can prevent it. If possible, it should not be heard at all, although it is promised that on future consideration it may be struck out. Evidence once heard, if important, leaves an impresson, and an impresson once made requires evidence to remove it. Quick and strong should be the interposition to prevent the introduction of harmful and incompetent evidence, but if it gets to the jury the subsequent effort to reject it should not be too open and pronounced, for the stronger the effort to get rid of it, the more importance jurors will attach to it, and the deeper it will sink into their minds. A good plan is to put the motion to reject in writing, stating specifically the grounds of objections, and hand the paper to the court without argument; and an instruction may usually be asked withdrawing or limiting the effect of such evidence. If, however, the advocate deems it expedient to fasten the minds of the jurors upon the matter, as sometimes happens, then the more earnest the argument the better.

Objections should be made at once to harmful questions, as a motion to strike out the answer may be overruled in most instances when the answer is responsive and the question itself was improper.<sup>44</sup> But, if the objection to the question is overruled it may be followed up by a motion to strike out and a request for an instruction withdrawing or limiting the effect of the evidence,<sup>45</sup> although if it is

<sup>44</sup> Ante § 891.

<sup>45</sup> *Pontius v. People*, 82 N. Y. 339;  
*Platner v. Platner*, 78 N. Y. 90.

It is the right of counsel to examine witnesses called by his adversary, to ascertain their compe-

tency, and this right, for the obvious reasons already suggested, should, whenever it is possible, be exercised before the witness is permitted to give testimony to the jury. *Trussell v. Scarlett*, 18 Fed.

desired to get error into the record, or for other reasons, it may sometimes be advisable to not follow up the objection by a motion to strike out or a request for an instruction lest the court, on further consideration, correct the error, as it may do in many cases.

**§ 1569. When objections should not be made.**—It is only evidence that is likely to do harm to which an objection should be made, except, perhaps, where the purpose is to prevent a useless waste of time, or the concealment of important facts by a mass of immaterial matter. It is folly to make objection where there is no reason to believe that the testimony will do harm, and too many objections are likely to prejudice the jury. “Never object to a question from your adversary,” says David Paul Brown, “without being able and disposed to enforce your objection.” If objections are fruitlessly made, an air of weakness is given to the case, for jurors are apt to infer that an advocate against whom the court often rules has a feeble case, which he is attempting to prop by technical objections. So, too, they are likely to regard it as an effort to keep the truth from them, or to give them only a partial view of it. It is but reasonable to expect them to look with great disfavor on anything that looks like a professional trick or a lawyer’s technicality. What they want is full information, and they resent any effort to keep it from them.

So, during cross-examination no objection should be made, as a rule, unless it is upon an important question, and the counsel making it is very confident he can maintain it. Objections, especially during cross-examination, create the impression that the advocate perceives that his witness is in distress and needs assistance, and that he is endeavoring to convey it through the medium of objections. Jurors are disposed to look upon such interruptions as intended to give the witness time to rally, or as meant to convey to him suggestions to assist him out of his difficulties. And it has been held that the court, where the witness has shown a desire to evade questions, may stop counsel from making frivolous objections clearly intended merely to prevent a rapid cross-examination.<sup>46</sup>

**§ 1570. Opening door to adversary—Inviting and curing error.**

214, and note; *Maurice v. Worden*, 54 Md. 233. And see *City of Ft. Wayne v. Coombs*, 107 Ind. 75.

Compare *Finch v. Chicago, &c. R. Co.* 46 Minn. 250, 48 N. W. 915.

<sup>46</sup> *State v. Duncan*, 116 Mo. 288, 22 S. W. 699.

A party cannot, ordinarily, complain of error which he himself invites. So, as elsewhere shown, by going into matters into which he has no absolute right to go he may sometimes open the door to his adversary.<sup>47</sup> In this way the adversary may get matters before the jury that could, otherwise, have been kept out, and in a great majority of cases he is ultimately benefited rather than the party who first opened the door. So, by asking improper questions and going into improper matters an examiner, and especially a cross-examiner, may sometimes be bound by the answers.<sup>48</sup> And not only may a party waive an error by not making the proper objection and saving his exception at the proper time, but he may also waive or cure it, in some instances, or at least render it harmless, by his own act.<sup>49</sup> If, therefore, error has been committed against a party and he has done all that is necessary to save the question, it may be better for him to "let well enough alone" rather than to continue to make objections; and so, he should be careful not to ask questions or introduce evidence, on his part, that would cure the error or render it harmless.

<sup>47</sup> See ante § 889.

<sup>48</sup> See ante § 977.

<sup>49</sup> See *Hemminger v. Western As-*  
*sur. Co.* 95 Mich. 355, 54 N. W. 949;  
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